

14  
No. 92-1856-CFX  
Status: GRANTED

Title: City of Ladue, et al., Petitioners  
v.  
Margaret P. Gilleo

Docketed:  
May 21, 1993

Court: United States Court of Appeals for  
the Eighth Circuit

Counsel for petitioner: Cherrick, Jordan B.

Counsel for respondent: Greiman, Gerald P.

Opinion amended 5-4-93.

Entry	Date	Note	Proceedings and Orders
1	May 21 1993	G	Petition for writ of certiorari filed.
2	Jun 21 1993		Brief of respondent Margaret P. Gilleo in opposition filed.
3	Jun 23 1993		DISTRIBUTED. September 27, 1993
4	Oct 4 1993		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 16, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 14, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, January 5, 1994. Rule 29 does not apply. *****
5	Nov 2 1993	*	Record filed. Partial proceedings United States Court of Appeals for the Eighth Circuit.
6	Nov 5 1993	*	Record filed. Original proceedings United States District Court for the Eastern District of Missouri (BOX)
7	Nov 15 1993		Joint appendix filed.
8	Nov 15 1993		Brief of petitioners City of Ladue, et al. filed.
10	Nov 15 1993		Brief amici curiae of National Institute of Municipal Law Officers, et al. filed.
9	Nov 16 1993		Brief amici curiae of Hawaii, et al. filed.
17	Dec 2 1993	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
11	Dec 13 1993		Brief amici curiae of American Advertising Federation, et al. filed.
15	Dec 13 1993		Brief amicus curiae of Association of National Advertisers, Inc. filed.
12	Dec 14 1993		Brief of respondent Margaret P. Gilleo filed.
13	Dec 14 1993		Brief amici curiae of People for the American Way, et al. filed.
14	Dec 14 1993		Brief amici curiae of Washington Legal Foundation, et al. filed.
16	Dec 14 1993		Brief amicus curiae of United States filed.
18	Dec 29 1993		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 23, 1994. (1ST CASE)
19	Jan 4 1994		Reply brief of petitioners filed.
20	Jan 4 1994		CIRCULATED.
21	Jan 10 1994		Motion of the Solicitor General for leave to participate

No. 92-1856-CFX

Entry	Date	Note	Proceedings and Orders
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22	Feb 23 1994		
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		in oral argument as amicus curiae and for divided argument GRANTED. ARGUED.	
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92-1856

No. \_\_\_\_\_

Supreme Court, U.S.  
FILED

MAY 21 1993

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1992

CITY OF LADUE, EDITH J. SPINK, MAYOR OF THE CITY  
OF LADUE, THOMAS R. REMINGTON, GEORGE L.  
HENSLEY, GALE S. JOHNSTON, JR., ROBERT A. WOOD,  
ROBERT D. MUDD, JOYCE T. MERRILL, AS MEMBERS  
OF THE CITY COUNCIL OF THE CITY OF LADUE,  
v. *Petitioners,*

MARGARET P. GILLES,  
*Respondent.*

**Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Eighth Circuit**

**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Whether the court of appeals erroneously held, in conflict with the reasoning of *City of Cincinnati v. Discovery Network, Inc.*, — U.S. —, 113 S. Ct. 1505 (1993), that the City of Ladue's sign ordinance is content-based in violation of the First Amendment because it allows limited exceptions to its prohibition of non-commercial and commercial signs, even though it is undisputed that the content-neutral legislative purpose of the exceptions and of the ordinance as a whole is to prohibit only those signs which, by their function or location, are most likely to proliferate, cause visual blight, diminish the value of real estate, or create safety hazards.

2. Whether, by relying on the plurality opinion in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), which is in conflict with the reasoning of *City of Cincinnati v. Discovery Network, Inc.*, — U.S. —, 113 S. Ct. 1505 (1993), the court of appeals mistakenly assumed that noncommercial speech deserves greater First Amendment protection than commercial speech and, as a result, erroneously held that the limited exceptions in the City of Ladue's sign ordinance favor commercial speech over noncommercial speech, rendering the ordinance unconstitutional.

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## **PETITION FOR A WRIT OF CERTIORARI**

The City of Ladue, Edith J. Spink, Mayor of the City of Ladue, Thomas R. Remington, George L. Hensley, Gale S. Johnston, Jr., Robert A. Wood, Robert D. Mudd, Joyce T. Merrill, as members of the City Council of Ladue, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

### **OPINIONS BELOW**

The opinion of the Court of Appeals (App. A, 1a-8a) is reported at 986 F.2d 1180 (8th Cir. 1993). The opinions of the District Court (App. B, C, D, 11a-31a) are reported at 774 F. Supp. 1559-1568 (E.D. Mo. 1991).<sup>1</sup>

### **JURISDICTION**

The judgment of the Court of Appeals was entered on February 22, 1993, the date the court's opinion was filed. On May 4, 1993, the Eighth Circuit amended its opinion by substituting three new pages from its original opinion to correct technical errors. Neither party filed a petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS**

The First Amendment to the United States Constitution provides, in part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

The City of Ladue's sign ordinance, passed on January 21, 1991, and amended on February 25, 1991, will be referred to as "New Chapter 35" or as the "sign ordinance" of the Code of the City of Ladue.<sup>2</sup> New

<sup>1</sup> References to "App." are to the Appendix to this petition. References to "Appendix" are to the portions of District Court Record that were filed as the Record on Appeal in the Eighth Circuit.

<sup>2</sup> On January 21, 1991, the City of Ladue (hereinafter "Ladue") repealed the then-existing Chapter 35 of the City Code relating to

Chapter 35 is reproduced in its entirety in Appendix F at 35a-50a.

### STATEMENT

1. *Ladue's Sign Ordinance.* The question presented by this petition is whether the First Amendment permits the City of Ladue, a small and principally residential community, to protect the quality of life of its residents by prohibiting noncommercial and commercial signs that proliferate, cause visual blight, diminish the value of real estate, or create safety hazards.

Ladue's sign ordinance generally prohibits all signs<sup>3</sup> within Ladue. App. F at 40a. The ordinance, however, permits a limited number of noncommercial and commercial signs, "which either contribute substantially to the public safety and welfare or, because of their limited number, location, and size, do not substantially impinge upon the City of Ladue's interests in privacy, aesthetics, safety and maintenance of real estate values so as to necessitate a total ban of all signs." App. F at 38a. (Declaration of Findings, Policies, Interests, and Purposes that support Ladue's sign ordinance).

The limited number of exceptions to Ladue's prohibition of signs include:

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signs. The parties have referred to Ladue's predecessor sign ordinance as "Old Chapter 35."

<sup>3</sup> Ladue's sign ordinance extends the definition of "sign" to those items that have a tendency to proliferate such as a "banner," commonly understood to be an elongated rectangle, and a "pennant," commonly understood to be a rectangle tapered to a point. App. F at 39a. The ordinance, however, does not extend the definition of signs to a "flag," commonly understood to be rectangular or square shaped. Consequently, an American flag or the flag of any other nationality or organization is not prohibited under the ordinance.

This Court has held that an ordinance should be narrowly construed with deference being given to the city's construction of the meaning of the ordinance. *Frisby v. Schultz*, 487 U.S. 474, 481-82 (1988). See also *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 800 (1989).

municipal signs, subdivision and residence identification signs, road signs and driveways signs for danger, direction, or identification, health inspection signs, signs for churches, religious institutions, and schools, identification signs for not-for-profit organizations, signs identifying the location of public transportation stops, signs advertising the sale or rental of real property, commercial signs<sup>4</sup> in the commercially zoned districts (1% of the total acreage of Ladue) and the industrial zoned districts (2% of the total acreage of Ladue), and signs identifying safety hazards.

App. F at 40a-41a.

Ladue's sign ordinance does not favor the content of any particular viewpoint expressed through a sign. Political, non-political, controversial, and non-controversial signs are all prohibited under Ladue's ordinance. Signs "For Peace In The Persian Gulf" violate Ladue's ordinance as do signs that say, "Wage War In The Gulf—Kill Saddam Hussein." Signs that ask residents to "Vote for School Taxes" violate Ladue's ordinance as do signs that announce, "Celebrate Joe's Fortieth Birthday." In addition, most commercial and noncommercial signs are prohibited. One may not advertise a "Bake Sale" or "School Picnic" in residential neighborhoods, which compromise 84% of Ladue's total acreage. None of these signs are prohibited because of the content of their messages. All of these signs are prohibited because the proliferation of signs in Ladue and the resulting blight offends the City's significant interests in aesthetics, safety, and the protection of real estate values.

2. *Ladue's Comprehensive Commitment to Preserving The Natural Beauty Of its Community.* Ladue is a small and predominantly residential community, of which only limited areas have been zoned for commercial or industrial use. Appendix F at 35a. Malcolm C. Drummond, a pro-

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<sup>4</sup> Ladue interprets this exception to apply only to commercial signs that identify the commercial premises or that are related to activities conducted on the premises.



fessional city planner and national expert in the field of municipal zoning regulations and land use, and the Honorable Edith J. Spink, Mayor of the City of Ladue, prepared detailed affidavits describing Ladue's long-standing and comprehensive interests in maintaining aesthetic, privacy, safety, and real estate values. Appendix at 104 (Drummond Affidavit ("Aff.")). See also Appendix at 282 (Spink Aff.).

Ladue has a unique and special heritage, with historical antecedents to settlements in the early nineteenth century. Appendix at 108, 285, Drummond Aff. ¶ 19, Spink Aff. ¶ 18. The City has a "rich inventory of buildings of special historical and/or architectural significance." Appendix at 108, Drummond Aff. ¶ 19.

Since its incorporation as a city in 1936, Ladue has made an extraordinary commitment to careful planning and zoning. Ladue has codified its zoning and land-use restrictions and has diligently enforced its comprehensive regulations to preserve the aesthetic and private qualities of Ladue's residential community. Appendix at 112-118, 183, 215, 288-295, Drummond Aff. ¶¶ 32-57.

Malcolm Drummond summarized his opinion of Ladue's unique ambience:

The large lot sizes and low building density have allowed for the maintenance of large areas of plant materials, woods, streams and open areas which make Ladue unique in the Midwest; I have done professional work for such midwestern cities as Indianapolis, Detroit, Cleveland, Chicago, Minneapolis, Omaha, Kansas City, Memphis, Dallas and Houston and, while each has lovely residential suburbs, in my opinion none has any suburb which can compare with Ladue in its aesthetic ambience and privacy or in the charm and visual quality it has been able to maintain through preservation of its low density, rustic, heavily-wooded, uncluttered and open appearance.

Appendix at 117-118, Drummond Aff. ¶ 56.

3. *A Proliferation Of Signs And Resulting Visual Blight Will Occur If The City of Ladue Is Not Permitted To Limit The Number Of Noncommercial and Commercial Signs.* Based upon his many years of professional experience, Drummond opined that the failure to regulate signs in Ladue will create a serious proliferation problem, which already exists in many municipalities in St. Louis County. Appendix at 123-125, Drummond Aff. ¶¶ 78-90. See also Appendix at 302-303, Spink Aff.; Spink Supplemental Aff. at 3, Ladue's Supplemental Appendix (additional factual support for Drummond's findings).

Drummond testified that those cities in the St. Louis area that have chosen not to regulate signage strictly have suffered the consequences of proliferation and visual blight. Appendix at 123-124; Drummond Aff. at ¶¶ 81-82. As Drummond observed:

Based upon my personal knowledge and experience, many municipalities in St. Louis County which do not strictly limit the erection of signs frequently experience a proliferation of yard signs and placards and temporary public signs in the public rights-of-way; this is true especially in the campaigns before municipal, primary, or general elections but such proliferation can and often does occur at other times as well; I have observed such proliferation in Ferguson, Webster Groves, St. Ann, Berkeley, Manchester and Ellisville, which are all cities in the St. Louis metropolitan area which I have served as a Planner.

Appendix at 123-124; Drummond Aff. ¶ 81.

The lower courts were required to accept Drummond's and Spink's affidavits as true under traditional summary judgment principles. Neither the Eighth Circuit nor the District Court, however, mentioned the significance of Ladue's extraordinary evidentiary record in support of its sign ordinance.<sup>5</sup>

<sup>5</sup> The only evidentiary dispute on the record between the parties involved the meaning of some answers by the Mayor and a councilman to hypothetical questions about the variance clause in the

4. *Ladue's Sign Ordinance Does Not Permit Gilleo To Place Yard Signs In Her Private Residential Subdivision.* Plaintiff Margaret P. Gilleo resides on Willow Hill Lane, a private street in the Willow Hill subdivision of Ladue. Appendix at 306, Spink Aff. ¶¶ 99, 101, 103. Willow Hill Lane is typical of most of Ladue's 207 private subdivision streets. Appendix at 296, Spink Aff. at ¶¶ 65, 66. While the street is "country-like, charming and private," it is also extremely narrow and winding and lacks adjacent sidewalks. Appendix at 296, Spink Aff. at ¶ 65.

Gilleo has maintained signs at her house bearing the legends, "Say No To War In the Persian Gulf/Call Congress Now," and "For Peace In The Gulf." Appendix at 10 (Plaintiff's Complaint ¶ 5); Appendix at 381 (Defendants' Amended Counterclaim, ¶ 11). Gilleo's signs are not permitted under Ladue's sign ordinance. App. F at 40a.

Gilleo filed a Complaint against Ladue pursuant to 42 U.S.C. § 1983 in which she challenged the constitutionality of Ladue's sign ordinance under the First Amendment of the United States Constitution. Gilleo sought injunctive relief to prevent Ladue from enforcing its sign ordinance.

After each party filed motions for summary judgment, the District Court entered Judgment for Gilleo, held that Ladue's sign ordinance violated the First Amendment, and permanently enjoined Ladue from enforcing its sign ordinance.<sup>6</sup> The District Court and the Eighth Circuit

previous sign ordinance. This dispute is legally irrelevant because New Chapter 35, the sign ordinance at issue, repealed the variance provision that was debated in Ladue's predecessor sign ordinance.

<sup>6</sup> Although Ladue's sign ordinance has a severability clause, the District Court effectively refused to enforce it by enjoining the ordinance's section 35-2, which prohibits all signs, as well as section 35-4, which allows limited exceptions to the general prohibition against signs.

each granted Gilleo a substantial award for attorneys' fees and expenses pursuant to 42 U.S.C. 1988.<sup>7</sup>

## REASONS FOR GRANTING THE PETITION

### A. The Eighth Circuit And The District Court Relied On Portions Of The Plurality Opinion In *Metromedia v. City Of San Diego*, 453 U.S. 490 (1981), Which Conflict With This Court's Test For Reasonable "Time, Place, Or Manner" Regulations Of Speech.

The Eighth Circuit and the District Court relied on the plurality opinion in *Metromedia* to hold that Ladue's sign ordinance was unconstitutional. App. A at 3a-4a (Eighth Circuit opinion); App. C at 16a-17a and D at 25a-29a (District Court opinion).<sup>8</sup> These courts inter-

<sup>7</sup> After receiving "demand" letters from Gilleo's attorneys for payment of plaintiff's attorneys' fees and expenses, Ladue was compelled to pay these awards in full. If, however, this Court grants certiorari and vacates or reverses the Eighth Circuit judgment, Gilleo will have no right to payment of any attorneys' fees and expenses under 42 U.S.C. § 1988. Under these circumstances, Gilleo and her attorneys must immediately return all attorneys' fees, expenses, and accrued interest to Ladue.

<sup>8</sup> The Eighth Circuit and the District Court erred in treating the plurality's opinion in *Metromedia* as a holding of the Supreme Court. In *Marks v. United States*, 430 U.S. 188 (1977), the Court stated that "[w]here no majority emerges in support of any single new standard, 'the controlling opinion . . . is that of the Justice or Justices who concur on the 'narrowest grounds.'"

In *Scadron v. City of Des Plaines*, 734 F. Supp. 1437 (N.D. Ill. 1990), District Judge (now Circuit Judge) Rovner thoroughly analyzed the *Metromedia* plurality's implied discrimination theory and concluded that it has no value as precedent because it has been rejected by a majority of the Justices on the Supreme Court. *Id.* at 1447 n.20. The court explained that "the reasoning of the concurrence is not simply narrower or broader than that of the plurality; rather, it is directly contrary to that of the plurality." *Id.*

Judge Rovner observed that a majority of the Justices on the *Metromedia* Court (Chief Justice Burger and Justices Brennan, Blackmun, Rehnquist, and Stevens) agreed that an ordinance could



preted the plurality opinion in *Metromedia* to compel the legal conclusion that Ladue's sign ordinance violated the First Amendment because it prohibited most noncommercial and commercial signs but provided exceptions for a limited number of noncommercial and commercial signs. App. A at 3a-5a (Eighth Circuit opinion); D at 26a-27a (District Court opinion). According to the courts below, the exceptions in Ladue's sign ordinance implicitly mean that "the city was improperly choosing appropriate subjects for public debate." App. A at 40a (quoting *Metromedia*, 453 U.S. at 514-515)) (Eighth Circuit opinion); App. D at 26a (District Court opinion).<sup>9</sup>

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be constitutional even if it generally prohibited most types of billboards but permitted limited exceptions. *Id.* at 1442. Judge Rovner concluded, "[A]lthough the plurality found that the exceptions constituted an impermissible content-based distinction, a majority of the Justices stated that the limited exceptions to the San Diego's ordinance's general prohibition on billboards were too insignificant to rise to the level of content-based discrimination." *Id.* at 1445.

<sup>9</sup>Justices Brennan and Blackmun criticized the *Metromedia* plurality's implied discrimination theory. They concurred in the Court's judgment but expressly rejected the "all or nothing" approach of the plurality's implied discrimination theory. Indeed, in his concurring opinion, Justice Brennan went so far as to characterize the plurality's view as "mak[ing] little sense." 453 U.S. at 532 n.10 (Brennan, J., concurring, joined by Blackmun, J.).

Justices Brennan and Blackmun would permit a prohibition of signs with narrowly tailored exceptions. 453 U.S. at 532. Before upholding such a prohibition, however, Justices Brennan and Blackmun would require the municipality to make a record that it is "seriously and comprehensively addressing aesthetic concerns . . . . By showing a comprehensive commitment to making its physical environment in commercial and industrial areas more attractive, and by allowing only narrowly tailored exceptions, if any, San Diego could demonstrate that its interest in creating an aesthetically pleasing environment is genuine and substantial." 453 U.S. at 531, 532, 533.

Justices Brennan and Blackmun concluded that they had "little doubt" that some jurisdictions—such as the historic community of

The assumption underlying the *Metromedia*'s plurality's implied discrimination theory was that *San Diego* failed to explain why its decision to exclude some types of signs from its general prohibition of signs advanced its goals of aesthetics and safety. 453 U.S. at 513, 514 ("The city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city . . . . No other commercial or ideological signs meeting the structural definition are permitted, regardless of their effect on traffic safety or esthetics.").

Ladue's sign ordinance is distinguishable from the *San Diego* ordinance that was criticized by the *Metromedia* plurality. Unlike San Diego's ordinance, Ladue's ordinance provides a sound and reasonable explanation for its allowance of certain signs. Ladue only permits signs that do not proliferate because they are naturally limited in number, or signs that protect the public's safety.

The District Court did not explain its conclusion that Ladue's extensive and uncontested record of the content-neutral purpose and justification for its sign ordinance does not distinguish Ladue's sign ordinance from San Diego's billboard ordinance. The Eighth Circuit asserted

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Williamsburg, Virginia—could prove the substantiality of their interest in aesthetics. 453 U.S. at 534.

The City of Ladue is precisely the type of unique community—dedicated to furthering the goals of aesthetics and safety—that can meet these strict constitutional standards under which a prohibition on signs with narrowly tailored exceptions would be permitted. The affidavits of Malcolm C. Drummond and Mayor Spink, and the exhaustive set of exhibits in support of each affidavit, provide this Court with an extensive record of Ladue's extraordinary commitment to fostering the important content-neutral values upon which Ladue's sign ordinance is based.

The Eighth Circuit and the District Court did not address Ladue's argument that its sign ordinance was constitutional under Justices Brennan and Blackmun's strict test.



that Ladue failed to explain the rationale for its sign ordinance. App. at 5a-6a, n.7 (quoting *Metromedia*, 453 U.S. at 513)). The Eighth Circuit, however, appears to reject or misunderstand Ladue's proliferation rationale, applicable to each exception, which was supported by a substantial uncontested evidentiary record filed in the summary judgment proceedings.

The *Metromedia* plurality's "implied discrimination theory conflicts with the reasoning of *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). *Ward* is the seminal case that explains the elements of the test for reasonable "time, place, or manner" regulations of speech.<sup>10</sup> The first element defines the term "content-neutral." The Court held that in determining whether a statute is "content-neutral," "[t]he government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others [citation omitted]. Government regulation of expressive activity is content-neutral so long as it is 'justified without reference to the content of the regulated speech.'" 491 U.S. at 791 (quoting *Clark v. Community For Creative Non-Violence*, 468 U.S. at 288 (1984) (emphasis added in *Ward*)). The Court applied its test for content-neutrality to uphold New York City's noise ordinance, designed to protect residents from loud and disturbing sound caused by musical concerts in Central Park. *Ward*, 491 U.S. at 785-803.

The problem that Ladue faces is not confined to Gilleo's yard signs. Rather, the problem is the proliferation of

<sup>10</sup> The "time, place, or manner" test is appropriate because Ladue's sign ordinance involves the regulation of signs and not a total ban on signs. Noncommercial and commercial signs are permitted if they do not proliferate. In addition, Ladue's sign ordinance only regulates one medium of speech by signs. Gilleo and others have numerous other mediums of speech to express themselves on any issue.

signs and the resulting visual blight that would occur if Ladue is compelled to allow all signs containing noncommercial speech. See Appendix at 123-127, Drummond Aff. ¶¶ 78-97 (discussing evidence of sign proliferation in municipalities in St. Louis County and explaining how Ladue's sign ordinance prevents the deleterious effects of this proliferation). As the Supreme Court concluded in *Ward*, "The validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." 491 U.S. at 801.

The District Court and the Eighth Circuit misunderstood this Court's holding in *Ward* that "content-neutrality" is defined by Ladue's "justification" for its sign ordinance. The District Court attempted to distinguish *Ward* as follows: "Unlike the regulation in *Ward* that sought only to regulate the volume of the protected speech, not the content or even the specific mix of the music, New Chapter 35 specifically looks to the content to identify exceptions to a general prohibition of all signs." App. C at 16a.

The District Court's opinion is contradicted by the Supreme Court's analysis in *Ward*. The Court acknowledged that volume is part of the "content" of musical expression and indeed is a key component of one's First Amendment right to express rock music. 491 U.S. at 786 n.1. Even though New York City's ordinance restricted Plaintiff's First Amendment right by allowing the city's sound technician to regulate the volume of the music, the Court upheld the ordinance because it was justified by the content-neutral purpose of maintaining a quiet environment in nearby residential neighborhoods. *Id.* at 792.

Ladue's sign ordinance is justified for similar content-neutral reasons. Ladue acted to protect the quality of life of its residents by prohibiting signs that proliferate, cause visual blight, create safety problems, and diminish

the value of residents' homes and real estate. The District Court erred in not recognizing the constitutional significance of the detailed justifications contained in Ladue's sign ordinance.

The Eighth Circuit was also confused about how to apply the *Ward* test. Apparently based on its erroneous interpretation of the plurality opinion in *Metromedia*, the Court assumed that Ladue's ordinance was content-based. App. A at 3a-5a. Presumably, the Court then erroneously assumed that the *Ward* analysis was irrelevant and proceeded to a discussion of the "secondary effects" test under *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-49 (1986). App. A at 5a.

The Eighth Circuit also ignored this Court's holding in *R.A.V. v. City of St. Paul*, — U.S. —, 112 S. Ct. 2538, 2545-2546 (1992). There, this Court followed *Ward* when it held that government may create classifications or exceptions in its regulatory scheme as long as each classification is justified by a content-neutral reason.<sup>11</sup>

Consistent with the principles of content-neutrality explained in *Ward* and *R.A.V.*, the Court in *City of Cincinnati v. Discovery Network, Inc.*, — U.S. —, 113 S. Ct. 1515 (1993), reserved the questions of "whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment

<sup>11</sup> *R.A.V.* signalled the demise of the District Court's and Eighth Circuit's holdings that Ladue discriminated against non-commercial speech because it permitted a limited number of signs. *R.A.V.* held that exceptions are permitted as long as the "selectivity of the restriction is [not] 'even arguably 'conditioned upon the sovereign's agreement with what a speaker may intend to say.'" 112 S. Ct. at 2547 (quoting *Metromedia*, 453 U.S. 490, 555 (Stevens, J., dissenting in part)). Justice Stevens' dissent in *Metromedia*, which would support the constitutionality of Ladue's sign ordinance, has now overtaken *Metromedia's* plurality opinion. The lower court opinions have lost their intellectual foundation and, therefore, should be reversed.

of commercial and noncommercial newsracks." 113 S. Ct. at 1516. The Court stated that a city must establish a "neutral justification" to support the constitutionality of a "content-neutral" ordinance under the First Amendment doctrine that permits government to enact reasonable "time, place, or manner" regulations of speech. *Id.* at 1515, 1517.

Sign proliferation causing visual blight and safety problems are content-neutral reasons that justify Ladue's decision to prohibit all signs that are likely to proliferate. In *Discovery Network*, the Court observed that Cincinnati was not defending its ordinance on the ground that commercial newsracks proliferate. *Id.* at 1515. This observation is important because in *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court recognized that a proliferation of signs would likely develop in a city that does not regulate the number of permitted signs. 466 U.S. at 817. The Court further acknowledged the adverse effect on the "quality of life" and the "value of property" created by the proliferation of signs. *Id.*

*Vincent* and *Discovery Network* establish that Ladue's sign ordinance satisfies this Court's test that permits reasonable "time, place, or manner" regulations of speech. *Vincent*, 466 U.S. at 804-805, 810, 817; *Discovery Network*, 113 S. Ct. at 1516-1517 (citing *Ward v. Rock Against Racism*, 491 U.S. at 791 and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986)) (ordinance will not violate First Amendment if it is justified by content-neutral "secondary effects" of speech).

Ladue's sign ordinance contains a detailed declaration of "findings, policies, interests, and purposes" which demonstrate Ladue's comprehensive commitment to the beautification of its city since it was formed in 1936. The declaration explains the content-neutral reasons for Ladue's decision to prohibit all signs with the limited exception of those that do not proliferate or cause safety problems. App. F at 35a-38a.



The declaration in the ordinance is supported by the uncontested affidavit of Malcolm C. Drummond, a nationally renowned land-use expert. Drummond testified that in the absence of New Chapter 35, signs would proliferate in Ladue and create visual blight, safety problems, and a deterioration of real estate values. Eighth Circuit Appendix at 122-135, Drummond Aff. at ¶¶ 77-90.

In addition to the element of content-neutrality, Ladue's sign ordinance satisfies the additional two elements of this Court's test for reasonable "time, place, or manner" regulations of speech:

1. The regulations are "narrowly tailored to serve a significant governmental interest."<sup>12</sup> *Ward*, 491 U.S. at 791; and
2. The regulations "leave open ample alternative channels for communication of the information." *Id.*

Ladue's sign ordinance satisfies each of the constitutional criteria for "narrow tailoring" discussed by the Court in *Discovery Network*.<sup>13</sup> First, unlike Cincinnati's

<sup>12</sup> The District Court and the Eighth Circuit acknowledged the well accepted proposition that Ladue's interests in aesthetics, safety, and the protection of real estate values are substantial. App. at D at 31a (Eighth Circuit); App. at A at 7a (District Court). See, e.g., *Vincent*, 466 U.S. at 806-87, 816-18.

<sup>13</sup> The *Discovery Network* Court reviewed Cincinnati's ban of commercial newsracks under the test in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 563 (1980). This Court has used the *Central Hudson* test to evaluate governmental regulations of commercial speech. In *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 477 (1989), the Court observed that the test for reviewing regulations of commercial speech is "substantially similar" to the Court's "time, place, or manner" test for reviewing regulations of non-commercial speech. See *Discovery Network, Inc.*, 113 S. Ct. at 1525 (Rehnquist, C.J., dissenting) (opining that "time, place, or manner" test is duplicative of *Central Hudson* test). See also *id.* at 1510 n.11 (reserving question of whether commercial speech is entitled to "more exacting" review).

old ordinance that was enacted before newsracks created an aesthetic problem, Ladue's New Chapter 35 was enacted to address safety problems and visual blight caused by the proliferation of signs. 113 S. Ct. at 1510.

Second, the Court characterized the Cincinnati ordinance as having a "paltry" or "minute" effect on reducing the total number of newsracks and, as a result, the ordinance did not address the problem of visual blight. On the other hand, the Ladue sign ordinance eradicates the problem of visual blight by prohibiting the vast majority of signs in the City. *Id.*

Third, whereas Cincinnati could have helped to remedy its problem by regulating the "size, shape, appearance, or number" of newsracks, these alternatives would not resolve the problem that Ladue faces with the prevention of a proliferation of signs. *Id.* Ladue already regulates the size and number of the few signs that are permitted so that the aesthetics of the community will be maintained.

As the Court observed in *Vincent*, "the substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself." *Vincent*, 466 U.S. at 810, 104 S. Ct. at 2131. Thus, "[b]y banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy." 466 U.S. at 808.<sup>14</sup>

The District Court and the Eighth Circuit have placed Ladue in a "Catch 22" position. These courts have overturned Ladue's sign ordinance because it permits exceptions

<sup>14</sup> Ladue's sign ordinance also satisfies the test in *Ward* for "narrow tailoring." *Ward* held that "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" 109 S. Ct. at 2758 (quotation omitted).

Ladue's sign ordinance satisfies *Ward's* test. By limiting the number of signs permitted in Ladue, the ordinance prevents the proliferation of signs that causes visual blight and other problems.

to its total ban of signs. Yet, even if Ladue were realistically able to ban all signs (which it is not), such an ordinance would be held to be unconstitutional because it would be overbroad—banning signs even if they do not proliferate and cause visual blight or other problems. By carefully permitting exceptions to its ordinance, Ladue is protecting First Amendment interests by allowing as much speech as possible through the medium of signs.

The summary judgment record is uncontested that Ladue satisfies the third element of the “time, place, or manner” test. Ladue’s sign ordinance leaves Gilleo and others alternative mediums of speech in which to express themselves effectively other than through signs. These mediums include letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings.

This Court should grant the Petition to clarify the application of the test for “time, place, or manner” regulations of speech to signs and billboards.<sup>15</sup>

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<sup>15</sup> The Court does not need to decide the applicability of the compelling state interest test because Ladue’s sign ordinance should be upheld under the “time, place, or manner” test as a content-neutral regulation of signs. Nevertheless, Ladue notes that its compelling state interests include its police powers, its right under the Tenth Amendment, and its right under the “liberty” and “property” clauses of the Fourteenth Amendment to protect the quality of life of its residents by prohibiting signs that scar the natural beauty of their living environment. Ladue also has a compelling interest under the First Amendment to permit as much speech as possible through its exceptions to its general ban on signs.

The Eighth Circuit stated without any support that “[w]e have no trouble concluding that Ladue’s ordinance is not the least restrictive alternative.” App. A at 7a. Gilleo has been unable to suggest a single alternative that is constitutional or that Ladue is not already using to protect the aesthetics of its community.

**B. The Eighth Circuit Has Caused Confusion for First Amendment Speech Jurisprudence by Misapplying The “Secondary Effects” Test And Failed To Recognize That Ladue’s Concern About The Proliferation Of Signs Is A Content-Neutral Justification For Its Sign Ordinance.**

Despite its erroneous conclusion that Ladue’s sign ordinance was content-based, the Eighth Circuit acknowledged the ordinance would be constitutional if it satisfied the “secondary effects” doctrine. App. A at 5a. The court correctly stated that the Ladue sign ordinance would not violate the First Amendment if it could show that it was “justified by a desire to eliminate a “secondary effect”—an undesirable effect unrelated to the content or communicative impact of speech.” *Id.* The Eighth Circuit panel also correctly identified the principal content-neutral secondary effects that Ladue identified to justify its ordinance—“visual blight, unsafe conditions, and decreased property values.” *Id.*

The Eighth Circuit, however, proceeded to misapply the secondary effects doctrine, ultimately concluding that the doctrine was “inapposite” and that the ordinance was unconstitutional. *Id.* at A at 5a-6a. The court’s holding is contradicted by the unambiguous language of the ordinance and the uncontroverted evidence in the summary judgment record.

The Eighth Circuit chose to ignore the purposes of Ladue’s sign ordinance as well as Ladue’s content-neutral justifications for the signs that are prohibited and permitted under the ordinance. Moreover, contrary to controlling case-law, the court did not even refer to the substantial uncontested evidentiary record that supports the distinctions made in the ordinance.

A careful analysis of the language in the Eighth Circuit’s opinion demonstrates that the Eighth Circuit’s position is indefensible as a matter of law. The Court stated:



Ladue fails at sufficiently supporting its secondary-effects argument. Specifically, Ladue has not shown that the prohibited signs cause more aesthetic, safety, and property value problems than the permitted signs. Stated in other words, the prohibited signs are no more associated with the particular "secondary effects" more than many of the permitted signs. . . . Ladue has "singled out" categories of signs for discriminatory treatment. The fact that the ordinance's differential treatment does not correlate with Ladue's interest in eliminating the secondary effects undermines Ladue's commitment to its secondary-effects justification and supports the contention that the ordinance is aimed at the content of the signs.

App. A at 5a-6a. In a footnote to the text of the opinion, the Eighth Circuit panel concedes Ladue's justification for its ordinance is to prohibit the proliferation of signs. ("[T]he ordinance excepts from the general ban only signs that are naturally limited in number or that are necessary to protect the safety of Ladue's residents."). App. at A at 6a. The court, however, claims that Ladue "has failed to provide sufficient factual support for this proliferation rationale." App. A at 6a n.7.

The Eighth Circuit's first error of law was its wholesale rejection of the undisputed factual foundation for Ladue's proliferation justification for its sign ordinance. The court, in effect, rejected the detailed content-neutral explanations in the text of the ordinance of the purpose for the prohibition of signs and of each exception. See App. F at 35a-38a. In addition, contrary to the well accepted principles for the standard of review in summary judgment proceedings and "time, place, or manner" regulations of speech,<sup>16</sup> the court, in effect, rejected

<sup>16</sup> The Eighth Circuit violated two legal standards governing review of a city's ordinance regulating the "time, place, or manner" of speech. In *City of Renton v. Playtime Theatres, Inc.*, 475

the uncontested affidavits of Malcolm Drummond and Mayor Spink. These affidavits laid the factual foundation of the danger of sign proliferation that would upset Ladue's historic commitment to the beautification of its small, residential community. See *Vincent*, 466 U.S. at 795 (reversing the court of appeals' rejection of the "sufficiency" of the city's justification for its ban on signs).

The Court's most significant legal error is its failure to recognize that each of the permitted signs is justified on the principle whether they "contribute substantially to the public safety and welfare or, because of their limited number, location, and size, do not substantially impinge upon the City of Ladue's interest in privacy, aesthetics, safety, and maintenance of property values so as to necessitate a total ban of all signs." New Chapter 35, Article I, App. F at 37a.

The Eighth Circuit had no principled basis to suggest that the permitted signs proliferate or are not needed to protect the safety of the community. App. F at 40a-41a (list of all permitted signs). The exceptions do not reflect that Ladue is discriminating in favor of any signs; the exceptions exist because these signs do not trigger Ladue's concerns of proliferation, visual blight, or safety.

The District Court contended that Ladue's sign ordinance was unconstitutional because it permitted real estate signs. The court overlooked the content-neutral justification for this exception stated in Article I of the sign ordinance. App. F at 36a-37a. Ladue permits "for sale" and "for lease" signs for two reasons: 1) Missouri law

U.S. 41, 51-52 (1986), the Court held that "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce new evidence of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." Furthermore, in *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989), this Court reaffirmed the courts' duty to defer to a city's reasonable judgment as to the best way of addressing the problems it faces.



requires municipalities to permit them; and 2) the limited number of homes for sale or for lease at any given time prevent their proliferation. *Id.*

The Eighth Circuit claimed the sign ordinance was content-based because it permitted commercial signs in commercially zoned districts and announcement signs at schools and churches. App. A at 6a n.7. The court, however, overlooked the fact that both of these types of signs cannot proliferate because of the limited number of commercial businesses in the small commercially-zoned area of Ladue (1% of the entire geographic area) and the relatively few schools and churches in the city.

In addition, the court failed to consider that the *location* of the sign is an important factor because each of these signs directly relates to identification of an "on-premises" activity. If commercial establishments, schools, and churches were not able to have at least one sign, they could not operate as they would have no realistic way of communicating with the public about their precise location. As the United States Justice Department has observed in its criticism of the Eighth Circuit opinion, the court failed to appreciate the distinction between on-site signs that do not proliferate and off-site signs that do proliferate. *See infra* § F.

Furthermore, the Eighth Circuit did not address the constitutional problem created by its own argument. If noncommercial or political signs, for example, were permitted in commercially zoned areas or at schools and churches, those few property owners would control the political debate in Ladue and could discriminate against the rights of all owners of residential property who were not permitted to erect political signs that can proliferate and cause visual blight. As this Court observed in *Vincent*:

[N]or is it clear that some of the suggested exceptions [to a prohibition of political signs] would even be constitutionally permissible. For example, even though political speech is entitled to the fullest possible measure of constitutional protection, there are

a host of other communications that command the same respect. An assertion that "Jesus Saves," that "Abortion is Murder," that every woman has the "Right to Choose," or that "Alcohol Kills," may have a claim to a constitutional exception from the ordinance that is just as strong as "Roland Vincent—City Council." [citation omitted]. To create an exemption for appellees' political speech and not these other types of speech might create a risk of engaging in constitutionally forbidden content discrimination. [citation omitted]. Moreover, the volume of permissible postings under such a mandated exemption might so limit the ordinance's effect as to defeat its aim of combatting visual blight.

466 U.S. at 816.

This Court, therefore, should grant the petition to clarify the First Amendment principles that, as reflected by the opinions of the Eighth Circuit and the District Court, have been misunderstood by the lower federal courts.

**C. There Is A Conflict Among The Circuit Courts On The Issue Of The Controlling First Amendment Principles Which Should Apply To Review A City's Ordinance That Prohibits Only Those Signs Which Cause Visual Blight And Safety Hazards.**

As evidenced by the Eighth Circuit's opinion in the case at bar, the lower courts are in confusion and disarray as to the appropriate First Amendment standards that apply to the issue of sign regulations designed to prevent visual blight and other evils that plague our nation's cities. While this Court has developed over the past few years significant changes in the test for "time, place, or manner" regulations of speech, the Eighth Circuit and other lower courts continue to apply rigidly the outdated plurality opinion in *Metromedia*.

The Eighth Circuit in the case at bar as well as the First, Second, and Ninth Circuits have ignored the fact that a majority of the Justices in *Metromedia* rejected the plurality's "all or nothing-at-all" approach, under which a city must either ban all signs or permit all signs. *See,*

e.g., *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985); *National Advertising Co. v. Town of Niagara*, 942 F.2d 145 (2nd Cir. 1991); *National Advertising Co. v. City of Orange*, 861 F.2d 246 (9th Cir. 1988).

On the other hand, the Fifth and Seventh Circuits have upheld sign ordinances that, like *Ladue*, do not prohibit all signs. These Circuits have upheld ordinances banning portable signs that create aesthetic problems. See, e.g., *Lindsay v. City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987); *Harnish v. Manatee County, Florida*, 783 F.2d 1535 (11th Cir. 1986).

The Fifth Circuit also has upheld a city's ordinance that prohibits off-premises signs with certain exception from its regulatory scheme. *Messer v. City of Douglasville, Ga.*, 975 F.2d 1505 (11th Cir. 1992), *cert. den.*, — U.S. — (May 17, 1993). The Sixth Circuit in *Wheeler v. Commissioner of Highways, Commonwealth of Kentucky*, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988) has upheld Kentucky's Highway Beautification Statute, Ky. Rev. Stat. Ann., §§ 177.830-177.890 (Baldwin 1985), which prohibits—with limited exceptions—billboards on its highways.

The confusion among the lower courts is exemplified by a recent Fourth Circuit case, *Arlington County Republican Committee v. Arlington County, Virginia*, 983 F.2d 587 (4th Cir. 1993), in which a divided panel held that a county's limit of two signs on residential, private property infringed speech by preventing multiple signs for multiple candidates. 983 F.2d at 594. Moreover, contrary to this Court's express rejection in *Ward*, 491 U.S. at 798-799, of the suggestion that a city's "time, place, or manner" regulation of speech be the least-restrictive" alternative, the majority of the Fourth Circuit panel held that the County was required to prove that it "could promote its interests through other, less restrictive means." *Arlington County Republican Committee*, 983 F.2d at 594.

This Court should grant the petition to resolve the conflict among the circuits and clarify the law for the lower courts as well as for local, state, and federal governmental officials.

**D. The Eighth Circuit's And District Court's Opinions, Which Are Premised On The Erroneous Principle That Noncommercial Speech Deserves Greater Constitutional Protection Than Commercial Speech, Conflict With The Reasoning Of *City of Cincinnati v. Discovery Network, Inc.*, — U.S. —, 113 S. Ct. 1505 (1993).**

Relying on the plurality opinion in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 493-521 (1981), the District Court and the Eighth Circuit held that because *Ladue* permits limited exceptions to its prohibition of signs, *Ladue*'s sign ordinance violates the First Amendment by "favoring commercial speech over noncommercial speech and by favoring certain types of noncommercial speech over others." App. F at 8a (Court of Appeals' Opinion); App. F at 31a (District Court's Opinion).

An assumption of the plurality opinion in *Metromedia*, on which the Eighth Circuit and the District Court principally rely, is that "noncommercial speech is accorded greater protection under the First Amendment than is commercial speech." *Metromedia*, 453 U.S. at 513; App. D. at 26a (District Court's opinion); App. A at 4a & cases cited therein (Court of Appeals' opinion).

The Eighth Circuit's and the District Court's opinions conflict with *City of Cincinnati v. Discovery Network, Inc.*, — U.S. —, 113 S. Ct. 1515 (1993). There, the Court held that a city's ordinance prohibiting newsracks containing commercial newspapers was unconstitutional because it "attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech." 113 S. Ct. at 1511.

In contrast to *Cincinnati*'s newsrack ordinance, *Ladue*'s sign ordinance is not based on an erroneous constitu-



tional distinction between noncommercial and commercial speech. Ladue prohibits all noncommercial and commercial signs that proliferate and cause visual blight, or that cause safety hazards. To the extent that signs do not proliferate, or cause safety problems, they are permitted.

The Court concluded that Cincinnati's ordinance, that was premised on the distinction between commercial and noncommercial speech, "bears no relationship *whatsoever* to the particular interests [of aesthetics and safety] that the city has asserted." 113 S. Ct. at 1514 (emphasis added). On the other hand, the guiding principle of Ladue's sign ordinance—whether the signs are likely to proliferate or cause safety hazards—directly relates to the city's interest in preventing visual blight and the deterioration of real estate values while also protecting the safety of the residents.

**E. This Court Should Address The Policy Question Of Whether The First Amendment Permits A City To Enact A Reasonable Ordinance That Will Enable A City To Eradicate Visual Blight and Other Evils Caused By A Proliferation Of Signs.**

The Eighth Circuit's opinion brings into sharp focus the theoretical and practical problems that have plagued the *Metromedia* plurality's "implied discrimination" theory for over a decade. Former Chief Justice Burger expressed the dilemma as creating "series of Hobson's choices" on all cities that desire to regulate the placement of signs and billboards. *Metromedia*, 453 U.S. at 569. The Chief Justice observed that "American cities . . . must, as a matter of *federal constitutional law*, elect between two unsatisfactory options: a) allowing all "noncommercial" signs, no matter how many, how dangerous, or how damaging to the environment; or b) forbidding signs altogether." *Id.* at 556 (Burger, C.J., dissenting) (emphasis in original).<sup>17</sup> See also *id.* at 540, 555 (Stevens, J.,

<sup>17</sup> Leading academic commentators agree with Chief Justice Burger's conclusion. See, e.g., D.R. Mandelker and W.R. Ewald, *Street Graphics and the Law* 190 (criticizing the *Metromedia*

dissenting in part) (agreeing with the opinion of Burger, C.J.); *id.* at 569 (Rehnquist, J., dissenting) (agreeing substantially with the opinion of Burger, C.J.).

More than ten years ago, Justice (now Chief Justice) Rehnquist predicted that the *Metromedia* opinion would be viewed by "city planning commissions and zoning boards [who] must regularly confront constitutional claims of this sort . . . as a virtual Tower of Babel, from which no definitive principles can be clearly drawn." 453 U.S. at 569 (Rehnquist, J., dissenting).

Experience has proven that Chief Justice Rehnquist's prediction has come true. The lower courts as well as the cities, states, and federal governmental authorities desperately need guidance as to the First Amendment principles that should be applied to the regulation of signs. This Court should grant the petition to announce the appropriate constitutional principles.

**F. The United States Has Criticized The Eighth Circuit's Opinion Which Jeopardizes The Constitutionality Of The Highway Beautification Act Of 1965.**

The District Court's "all or nothing," "implied discrimination" theory raises questions about the constitutionality of the federal Highway Beautification Act of 1965 (hereinafter "Act"), 23 U.S.C.A. § 131 *et seq.* (West Supp. 1990). See *Metromedia*, 453 U.S. at 515 n.20 (reserving question concerning the constitutionality of the Act).

The purpose of the Act is to regulate signs and billboards adjacent to the interstate highway system "to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C.A. § 131(a). The Act contains a list of exceptions to its general ban of

plurality's opinion "because it places municipalities in an impossible position").

signs within the regulated area. These exceptions permit signs that include:

1. "directional and official signs;"
2. signs "advertising sale or lease of the property upon which they are located;"
3. signs "advertising activities conducted on the property on which they are located;"
4. "landmark signs . . . of historic or artistic significance;" and
5. signs "advertising distribution by nonprofit organizations of free coffee to individuals traveling" on the highways.

23 U.S.C.A. § 131(c).

Based upon the District Court's theory, one might argue that the limited number of signs that are permitted under the Act reflects Congress' implied intent to discriminate against political and other forms of noncommercial speech that are prohibited under the federal legislation. On the other hand, the Act would pass the "time, place, or manner" test under *Ward, R.A.V.*, and *Vincent* because the exceptions in the statute reflect the content-neutral purposes or justifications for the Act—preservation of the natural scenic beauty of the landscape, safety, and protection of the "public investment" in the highway system. The permitted signs would allow as much speech as possible while also preventing the proliferation of signs and the resulting visual blight. See *Wheeler v. Commissioner of Highways, Commonwealth of Kentucky*, 822 F.2d 586, 590, 591 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988) (upholding constitutionality of Kentucky's Billboard Act, Ky. Rev. Stat. Ann. §§ 177.830-177.890 (Baldwin 1985), because it was content-neutral under *Ward* and *Renton* in that it was justified by aesthetic considerations).

Ladue contended in its briefs filed in the Eighth Circuit that the reasoning of a ruling that would overturn Ladue's sign ordinance would compel a similar holding

for the federal Highway Beautification Act. The Eighth Circuit declined to address Ladue's contention.

In a case pending before the United States Court of Appeals for the Third Circuit, *Rappa v. McNulty*, No. 92-7293 (3rd Cir. argued January 20, 1993), the Court invited the United States Justice Department to address the issue of the constitutionality of the federal Highway Beautification Act. The underlying litigation arose from a challenge to the constitutionality of the Delaware Outdoor Advertising Law, Del. Code Ann. tit. 17, §§ 1101-1126, by Daniel Rappa, a candidate for election to the United States House of Representatives who was not permitted to display his campaign signs.

The United States filed an *amicus curiae* on April 7, 1993. The Justice Department sharply criticized the Eighth Circuit's opinion in *Gilleo v. City of Ladue* as reflecting the confusion in the lower courts as to the proper First Amendment analysis that should be applied to governmental regulations of signs. The Government included the Eighth Circuit with several other courts that have "appeared to take the view that exceptions for onsite signs are necessarily content-based and unlawful, at least in the absence of preferential treatment of noncommercial messages." Brief for the United States as *amicus curiae* at 25, *Rappa v. McNulty*, No. 92-7293 (3d cir. argued January 20, 1993). The United States asserted that like *Gilleo* and other cases with similar faulty constitutional reasoning, the Delaware District Court "fell into . . . error[] . . . presuming without careful analysis that the Delaware law favored commercial over noncommercial speech, merely because it permits onsite signs." *Id.* at 26.

The United States focused on *Gilleo* to highlight an additional serious constitutional error in the Eighth Circuit's view of "time, place, or manner" First Amendment jurisprudence which is inconsistent with this Court's opinion this Term in *Discovery Network, Inc.* The Government observed that the proliferation of signs is an important justification for creating content-neutral distinctions



in a sign ordinance. *Id.* at 35-36 & n.22. The Justice Department criticized the Eighth Circuit for "fail[ing] to recognize these inherent differences" between onsite signs, that do not tend to proliferate and are "self-limiting," and offsite signs that are "far more prone to proliferation." *Id.* at 36 & n.22.<sup>18</sup>

**G. The Court Should Invite The Solicitor General To Express The Views Of The United States On The Merits Of The Petition.**

The City of Ladue respectfully asks the Court to invite the Solicitor General to express the views of the United States on the merits of the petition. The issues raised in this petition involve environmental questions of national importance. A serious problem of sign pollution and visual blight exists in cities throughout the United States as well as on the nation's highways that have been protected by the Highway Beautification Act for almost thirty years. The Court would benefit from the Solicitor General's analysis of the First Amendment issues and

<sup>18</sup> The Justice Department explained that the prevention of a proliferation of signs is a central content-neutral goal of legislation aimed at reducing the number of permitted signs to be displayed. "[O]utdoor sign laws are aimed in large part at controlling the proliferation of signs. It may well be impossible to eliminate all signs from our highways. However, a 10-mile stretch of scenic highway interrupted by ten signs will still offer many attractive vistas, while one with 100 or 1000 signs will not. An onsite/offsite distinction directly furthers the interest in controlling the number of signs, because onsite signs are self-limiting." Brief at 35-36.

The guiding principle of Ladue's sign ordinance is the prevention of the proliferation of signs and the resulting visual blight and impairment of real estate values. The rationale for the distinction between offsite signs (which are prohibited) and onsite signs that are used for identification or are related to site activities (which are permitted) is that onsite signs are necessary because alternative means of communication generally do not exist and, by definition, cannot proliferate at other locations.

Yard signs such as those such as the Plaintiff Gilleo should be classified as offsite signs. They do not identify or relate to activities on the premises and there are numerous alternative and effective means of communication of the message.

his perspective on the jurisprudential uncertainty that exists in the lower federal courts.

**H. This Court Should Grant The Petition, And Set The Case For Full Briefing And Argument On The Merits; Alternatively, The Court Should Vacate The Judgment And Remand To The Eighth Circuit For Further Consideration In Light Of *City Of Cincinnati v. Discovery Network, Inc.*, — U.S. —, 113 S. Ct. 1505 (1993).**

The Eighth Circuit's opinion pre-dated this Court's opinion in *Discovery Network, Inc.* Ladue has demonstrated that the Eighth Circuit's opinion conflicts with the reasoning of *Discovery Network, Inc.* At a minimum, therefore, the Court should grant the petition, vacate the judgment, and remand to the Eighth Circuit for further consideration in light of *Discovery Network, Inc.*

Ladue, however, respectfully requests the Court to grant the petition, and order full briefing and argument on the merits. Remanding this case to the Eighth Circuit would probably only delay the eventual disposition of this case by this Court. The Eighth Circuit and other lower federal courts need direction as to the manner in which signs can be regulated consistent with the First Amendment.

Confusion reigns in the lower federal courts. Rather than balancing the First Amendment against the interests of federal, state, and local government to prevent the proliferation of signs, the Eighth Circuit and other federal courts are taking an absolutist approach to the First Amendment that is directly at odds with the jurisprudence of this Court. A definitive opinion from this Court is desperately needed to resolve the conflict among the lower courts.

This Court should also take the opportunity to address an additional issue in the instant case that has caused uncertainty among the lower courts. The issue involves the level of First Amendment scrutiny that should be applied to governmental regulation of private property.

The District Court erroneously held that speech on private property in a residential area is entitled to greater



protection than speech in a public forum. App. D at 29a-30a. The Eighth Circuit assumed "*arguendo* that the "secondary effects" doctrine extends to cases involving the prohibition of political signs on private property." App. A at 5a.

The Court has previously addressed this issue in *dictum*.<sup>19</sup> A definitive analysis of the issue is needed for the lower courts and the governmental entities who enact regulations of signs throughout the country.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the petition for a writ of certiorari should be granted, the Eighth Circuit's judgment should be vacated, and the case should be remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *City of Cincinnati v. Discovery Network, Inc.*, — U.S. —, 113 S. Ct. 1505 (1993).

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<sup>19</sup> Justice Stevens wrote for the Court in *Vincent* that the esthetics interests are both "psychological and economic" and are "presumptively at work in all parts of the city." 453 U.S. at 552.

In his dissenting opinion in *Metromedia*, Justice Stevens emphasized the right of a city to prevent the visual blight caused by a proliferation of signs in residential as well as commercial parts of the city. "It seems to be accepted by all that a zoning regulation excluding billboards from residential neighborhoods is justified by the interest in maintaining pleasant surroundings and enhancing property values. . . . The character of the environment affects property values and the quality of life not only for the suburban resident but equally so for the individual who toils in a factory or invests his capital in industrial properties." 453 U.S. at 540, 552 (Stevens, J., dissenting in part).

In reviewing Ladue's sign ordinance, the Court should also be sensitive to Ladue's right to protect the privacy interests of its residents and the natural charm of its beautiful areas. *Cf. Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932) (Brandeis, J.) ("The radio can be turned off, but not so the billboard or street car placard."); *Vincent*, 466 U.S. at 806 (approval of "captive audience" theory).

Respectfully submitted,

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May 21, 1993

## **APPENDICES**

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**APPENDIX A**

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

Nos. 92-2232 and 92-2235

MARGARET P. GILLO,  
v. *Plaintiff-Appellee,*

CITY OF LADUE; EDITH J. SPINK, Mayor of the City of  
Ladue; THOMAS R. REMINGTON, as member of the  
City Council of the City of Ladue; GEORGE L. HENS-  
LEY, as member of the City Council of the City of  
Ladue; GALE S. JOHNSTON, JR., as member of the City  
Council of the City of Ladue; ROBERT A. WOOD, as  
member of the City Council of the City of Ladue;  
ROBERT D. MUDD, as member of the City Council of  
the City of Ladue; GEORGE FONYO, as member of the  
City Council of the City of Ladue,  
*Defendants-Appellants.*

Appeal from the United States District Court  
for the Eastern District of Missouri

Submitted: January 13, 1993

Filed: February 22, 1993

[As Amended on May 4, 1993]



Before MORRIS SHEPPARD ARNOLD, Circuit Judge, FLOYD R. GIBSON and REAVLEY,\* Senior Circuit Judges.

REAVLEY, Circuit Judge.

The district court concluded that the City of Ladue's sign ordinance is unconstitutional and permanently enjoined Ladue from enforcing it. We affirm the court's injunction, but modify the court's award of attorneys' fees.

### I. BACKGROUND

Ladue enacted an ordinance that prohibits most signs within the city (the ordinance).<sup>1</sup> Ladue City Ordinance Chapter 35. The ordinance enumerates specific exceptions to the general prohibition.<sup>2</sup> Ladue's stated reasons for its ordinances are: (1) to preserve the natural beauty of the community; (2) to protect the safety of residents; and (3) to maintain the value of real estate. Chapter 35, Article I ("Declaration of Findings, Policies, Interests, and Purposes").

\* The HONORABLE THOMAS M. REAVLEY, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

<sup>1</sup> The ordinance defines the term "sign" to include banners, pennants, insignia, bulletin boards, ground signs, billboards, poster billboards, illuminated signs, projecting signs, temporary signs, marquees, roof signs, yard signs, electric signs, wall signs, and window signs. According to Ladue's reply brief, the ordinance does not prohibit "rectangular or square shaped flags."

<sup>2</sup> The following signs are permitted: municipal signs; subdivision signs; residence identification signs; road signs and driveway signs for danger, direction, or identification; health inspection signs; church, religious institution, and school signs announcing names, services, activities, or functions (limited by number); identification signs for nonprofit organizations; signs identifying the location of public transportation stops; ground signs advertising the sale or rental of real property (one per property); commercial signs in districts zoned for commercial or industrial use (limited by number); and signs identifying safety hazards.

Margaret P. Gilleo placed an 11 x 8.5 inch sign stating "For Peace in the Gulf" in the front window of her home. Gilleo was informed that her sign violated Ladue's ordinance. She filed a complaint in federal district court asserting that the ordinance violates her First Amendment right to freedom of speech. Ladue filed a counterclaim for a declaratory judgment that its ordinance is constitutional. Both parties filed motions for summary judgment. The district court entered summary judgment in favor of Gilleo, declaring the ordinance unconstitutional. The court permanently enjoined Ladue from enforcing portions of its ordinance and awarded Gilleo \$74,813.25 in attorneys' fees. On appeal, Ladue challenges both the injunction and the fee award.

### II. Discussion

#### A. CONTENT-BASED RESTRICTIONS

Our method of analyzing the constitutionality of Ladue's ordinance depends on whether the ordinance is "content-neutral" or "content-based."

In classifying the ordinance as content-neutral or content-based, we are guided by the Supreme Court's plurality opinion in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882 (1981). San Diego, in an effort to improve both the safety and the appearance of the city, enacted an ordinance prohibiting billboards in the city. The billboard ordinance excepted on-site billboards identifying the owner or occupant of the premises or advertising goods or services available on the property. Additionally, the billboard ordinance excepted various types of noncommercial signs.<sup>3</sup> In holding San

<sup>3</sup> The noncommercial signs excepted were: government signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; "for sale" and "for lease" signs; signs on public

Diego's billboard ordinance unconstitutional, the plurality articulated two concerns. First, by permitting on-site commercial billboards but banning on-site noncommercial billboards, the billboard ordinance favored commercial speech over noncommercial speech. *Id.* at 513, 101 S. Ct. at 2895. Second, by excepting some types of noncommercial speech from the general ban, the city was improperly choosing the appropriate subjects for public debate. *Id.* at 514-15, 101 S. Ct. at 2896. The plurality identified San Diego's billboard ordinance as a content-based regulation.

Ladue's ordinance raises the same concerns. The ordinance favors commercial speech over noncommercial speech,<sup>4</sup> and it favors certain types of noncommercial speech over others. Following the plurality in *Metromedia*, we conclude that Ladue's ordinance is a "content-based" regulation.<sup>5</sup> See *National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 147 (2d Cir. 1991) (following *Metromedia*); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 248-49 (9th Cir. 1988) (same); *Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985) (same). However, because of the Supreme Court's writing since *Metromedia*, we should address

and commercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and temporary political campaign signs.

<sup>4</sup> For example, the ordinance permits commercial signs in districts zoned for commercial or industrial use, but it prohibits most noncommercial signs in those districts.

<sup>5</sup> We recognize that the ordinance is viewpoint neutral. But viewpoint neutrality does not render the statute content-neutral. *Burson v. Freeman*, —U.S.—, 112 S. Ct. 1846, 1850 (1992); *Boos v. Barry*, 485 U.S. 312, 319, 108 S. Ct. 1157, 1163 (1988). "The First Amendment's hostility to content-based regulations extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537, 100 S.Ct. 2326, 2333 (1980).

Ladue's argument concerning the "secondary effects" doctrine.

## B. "SECONDARY EFFECTS" DOCTRINE

Under the secondary effects doctrine, a seemingly content-based regulation is analyzed as a content-neutral regulation if the government shows that the regulation is justified by a desire to eliminate a "secondary effect"—an undesirable effect unrelated to the content or communicative impact of the speech. See *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-49, 106 S. Ct. 925, 929-30 (1986) (articulating a "secondary effects" test for distinguishing content-based from content-neutral regulations). As stated in *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754 (1989), "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Ladue asserts that its ordinance is aimed only at preventing the adverse secondary effects caused by an overabundance of signs in the community. The secondary effects identified by Ladue include visual blight, unsafe conditions, and decreased property values.

Assuming *arguendo* that the "secondary effects" doctrine extends to cases involving the prohibition of political signs on private property,<sup>6</sup> Ladue fails at sufficiently supporting its secondary-effects argument. Specifically, Ladue has not shown that the prohibited signs cause more aesthetic, safety, and property value problems than the permitted signs. Stated in other words, the prohibited signs are no more associated with the particular "secondary

<sup>6</sup> We have some doubt as to Ladue's argument that the Supreme Court's adoption of the "secondary effects" doctrine has affected the precedential value of the Court's plurality decision in *Metromedia*.



effects" than many of the permitted signs.<sup>7</sup> Compare *Renton*, 475 U.S. at 51-53, 106 S. Ct. at 931-32 (ordinance was aimed at the particular secondary effects that surround theaters featuring sexually explicit films). Ladue has "singled out" certain categories of signs for discriminatory treatment. The fact that the ordinance's differential treatment does not correlate with Ladue's interest in eliminating the secondary effects undermines Ladue's commitment to its secondary-effects justification and supports the contention that the ordinance is aimed at the content of the signs. Compare *id.* (concluding that *Renton* had not "singled out" adult theaters for discriminatory treatment and that there was no evidence of under-inclusiveness). In short, the ordinance's sign exceptions, many of which cause the same secondary effects as the prohibited signs, renders the secondary effects doctrine inapposite to this case.

### C. CONSTITUTIONALITY OF THE CONTENT-BASED RESTRICTION

Content-based restrictions are subject to strict scrutiny. To survive strict scrutiny, content-based restrictions must

<sup>7</sup> Ladue asserts that its ordinance prohibits signs that tend to proliferate. According to Ladue, the ordinance excepts from the general ban only signs that are naturally limited in number or that are necessary to protect the safety of Ladue's residents. Ladue, however, has failed to provide sufficient factual support for this proliferation rationale. For example, Ladue's proliferation rationale might explain why the ordinance limits the number of signs that a commercial business, a church, or a school may erect, but it does not explain why the ordinance additionally restricts the content of those signs. (Under the ordinance, commercial businesses may only erect a limited number of commercial signs, and schools and churches may only erect a limited amount of announcement signs.) Cf. *Metromedia*, 453 U.S. at 513, 101 S. Ct. at 2895 (noting that San Diego did "not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city").

be necessary to serve a compelling interest and must be narrowly drawn to achieve that end. *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, — U.S. —, 112 S. Ct. 501, 509 (1991). While Ladue's interests in enacting its ordinance are substantial, see *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-07, 104 S. Ct. 2118, 2129-30 (1984), the interests are not sufficiently "compelling" to support a content-based restriction. With respect to the "narrowly-drawn" requirement, the content-based restriction must be the least restrictive alternative available. See *Ward*, 491 U.S. at 798 n.6, 109 S. Ct. at 2758 n.6. (explaining that the "narrowly-tailored" test differs according to whether the restriction is content-based or content-neutral). We have no trouble concluding that Ladue's ordinance is not the least restrictive alternative. Therefore, we affirm the district court's holding that Ladue's ordinance is unconstitutional.

We also conclude that the district court did not err in refusing to instate Ladue's back-up plan, which provides that all signs not specifically restricted by other parts of the ordinance must be no greater than six square feet. Neither side argued the constitutionality of such a plan to the district court.

### D. ATTORNEYS' FEES

Pursuant to 42 U.S.C. § 1988, the district court awarded Gilleo \$74,813.25 in attorneys' fees. The amount includes a 15% enhancement over the lodestar amount to compensate Gilleo's attorneys for taking the case on a contingency basis. In *City of Burlington v. Dague*, — U.S. —, 112 S. Ct. 2638, 2643-44 (1992), the Supreme Court held that enhancement for contingency is not permitted under certain fee-shifting statutes. Although *Dague* concerns the fee-shifting provisions of the Solid Waste Disposal Act and the Clean Water Act, the Court's analysis applies equally to § 1988. See *id.* at —, 112

S. Ct. at 2641. We vacate the district court's 15% enhancement, thus reducing the fee award from \$74,813.25 to \$65,055.00.

### III. CONCLUSION

Ladue's ordinance violates the First Amendment by favoring commercial speech over noncommercial speech and by favoring certain types of noncommercial speech over others. We affirm the district court's permanent injunction, and reduce the court's attorneys' fee award to \$65,055.00.

AFFIRMED as MODIFIED.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

### APPENDIX B

#### UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Nos. 92-2232 and 92-2235

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MARGARET P. GILLES,  
*Plaintiff-Appellee,*

v.

CITY OF LADUE; EDITH J. SPINK, Mayor of the City of Ladue; THOMAS R. REMINGTON, as member of the City Council of the City of Ladue; GEORGE L. HENSELEY, as member of the City Council of the City of Ladue; GALE S. JOHNSTON, JR., as member of the City Council of the City of Ladue; ROBERT A. WOOD, as member of the City Council of the City of Ladue; ROBERT D. MUDD, as member of the City Council of the City of Ladue; GEORGE FONYO, as member of the City Council of the City of Ladue,  
*Defendants-Appellants.*

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Appeal from the United States District Court  
for the Eastern District of Missouri

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Filed: April 8, 1993

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After consideration of the application of plaintiff's counsel Green, Hoffmann and Dankenbring for attorneys'

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fees and expenses, together with defendants objections, the court decides that the application should be granted with reduction of the hourly charges to accord with the award of the district judge, and it is therefore

Ordered that the appellants shall pay \$31,500 for attorneys' fees and \$2,566.86 for expenses incurred by counsel Green, Hoffman and Dankenbring during the appeal of this case.

A True

Attest Copy: /s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

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APPENDIX C

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

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Cause No. 90-2396C(7)

MARGARET P. GILLES, *Plaintiff,*

v.

CITY OF LADUE, *et al.,*  
*Defendants.*

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MEMORANDUM AND ORDER

[Filed Oct. 1, 1991]

This matter is before the Court on Plaintiff's motion for summary judgment and permanent injunction and on Defendant's motion for summary judgment.

On January 7, 1991, this Court entered an order granting Plaintiff's request for preliminary injunction, restraining Defendants from enforcing Chapter 35 (hereinafter Old Chapter 35), the City of Ladue's sign ordinance. On January 21, 1991, Defendants repealed Old Chapter 35 and enacted a new sign ordinance (hereinafter New Chapter 35).<sup>1</sup> Thereafter Plaintiff amended her complaint and now seeks summary judgment on her request for a permanent injunction against enforcement of New Chapter 35. Plaintiff retains many of the factual allegations relevant only to Old Chapter 35 in her pleading and memorandum in support of summary judgment. Defendants filed a counterclaim seeking a declaratory judgment that New

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<sup>1</sup> New Chapter 35 was amended on February 25, 1991.



Chapter 35 is valid and enforceable under the Constitution. Defendants seek summary judgment on their counterclaim.

The Court ordered both parties to file memoranda relating to this Court's jurisdiction over the matter. Both parties filed documents before the Court stipulating that New Chapter 35 would not be enforced during the pendency of this suit. See Plaintiff's Second Amended Complaint ¶ 19; Defendants' Joint Answer to Plaintiff's Second Amended Complaint ¶ 19; Defendants' Amended Counterclaim ¶ 15. Subsequent to the Court's order for jurisdictional memoranda, Defendant City of Ladue amended its answer and notified all parties that New Chapter 35 would be enforced. See Defendants' Amendments by Interlineation filed April 22, 1991. Plaintiff filed a memorandum citing *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953) and *United States Dept. of Agriculture v. FLRA*, 876 F.2d 50 (8th Cir. 1989). Both cases state that voluntary cessation of allegedly illegal conduct does not make a case moot. In *W.T. Grant Co.*, the Supreme Court stated that defendants would be free to return to their old ways if Courts dismissed as moot cases where the defendant voluntarily ceased the allegedly illegal conduct. *W.T. Grant*, 345 U.S. at 632. However, the Supreme Court noted that "the case may nevertheless be moot if defendant demonstrates there is no reasonable expectation that the wrong will be repeated." *Id.* at 633. Defendants repealed Old Chapter 35 and enacted a completely new chapter relating to sign regulation. While Plaintiff may contend New Chapter 35 suffers the same Constitutional infirmities as Old Chapter 35, Old Chapter 35 no longer exists. Thus, there is no reasonable expectation that the specific wrongs committed by the City of Ladue pursuant to Old Chapter 35 and found unconstitutional by this Court can be repeated in view of that chapter's repeal. Therefore, any arguments pertaining exclusively to Old Chapter 35 are moot.

This Court may grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The substantive law determines which facts are critical and which are irrelevant. Only disputes over facts that might affect the outcome will properly preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is not proper if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*

A moving party always bears the burden of informing the Court of the basis of its motion. *Celotex Corp.*, 477 U.S. at 323. Once the moving party discharges this burden, the nonmoving party must set forth specific facts demonstrating that there is a dispute as to a genuine issue of material fact, not the "mere existence of some alleged factual dispute." Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 247. The nonmoving party may not rest upon mere allegations or denials of his pleading. *Id.* at 256.

In passing on a motion for summary judgment, the Court must view the facts in the light most favorable to the nonmoving party, and all justifiable inferences are to be drawn in his favor. *Id.* at 255. The Court's function is not to weigh the evidence but to determine whether there is a genuine issue for trial. *Id.* at 249.

The standard for determining whether a permanent injunction should issue is essentially the same as the standard for a preliminary injunction, with the exception that the Court determines the merits rather than Plaintiff's likelihood of success on the merits. *Current-Jacks Ford Canoe Rental Ass'n v. Clark*, 603 F.Supp. 421, 424-25 (E.D. Mo. 1985). The Court must also consider (1) whether the moving party will suffer irreparable injury

absent the injunction; (2) the injury to the moving party as balanced against the harm to the other party should the injunction issue; and (3) the effect on the public interest. *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

New Chapter 35 generally prohibits all signs and billboards within Ladue. Article II, § 35-2.<sup>2</sup> New Chapter 35 provides for a limited number of exceptions to this general prohibition.<sup>3</sup> The new chapter adds a lengthy

<sup>2</sup> Section 35-2 states:

No sign shall be erected, constructed, painted, placed, enlarged, maintained, changed or relocated except in conformity with the provisions of this chapter.

<sup>3</sup> Section 35-4 provides:

Subject to the applicable regulations hereinafter described, the following types of signs are permitted in the City of Ladue:

- a) Municipal signs but said signs shall not be greater than nine (9) square feet.
- b) Subdivision and residence identification signs of a permanent character but said signs shall not be greater than six (6) square feet and said residence identification signs shall not be greater than one (1) square foot.
- c) Road signs and driveway signs for danger, direction, or identification but said signs shall not be greater than twelve (12) square feet.
- d) Health inspection signs but said signs shall not be greater than two (2) square feet.
- e) Signs for churches, religious institutions, and schools subject to the restrictions described in Sec. 35-5.
- f) Identification signs for not-for-profit organizations not otherwise described herein but said signs shall not be greater than sixteen (16) square feet.
- g) Signs identifying the location of public transportation stops but said signs shall not be greater than three (3) square feet.
- h) Ground signs advertising the sale or rental of real property subject to the restrictions described in Sec. 35-10.
- i) Commercial signs in commercially zoned or industrial zoned districts subject to the restrictions as to size, location, and time of placement hereinafter described.
- j) Signs identifying safety hazards but said sign shall not be greater than twelve (12) square feet.

section in Article I entitled "Declaration of Findings, Policies, Interests, and Purposes." New Chapter 35 also includes § 35-24 providing for severability of parts of the chapter.

Defendants maintain that *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746 (1989) (represents a dramatic change in First Amendment jurisprudence although none of their memoranda prior to the preliminary injunction cite the case. (Defendants' Suggestions in Support p. 13). The regulation in *Ward* required performers to use sound-amplification equipment and a sound technician provided by the city when performing at the Bandshell, a public facility in New York City's Central Park. *Ward*, 109 S.Ct. at 2750. After the Court of Appeals reversed the District Court's decision that the regulation was a valid time, manner, and place regulation, the Supreme Court granted certiorari "to clarify the legal standard applicable to governmental regulation of the time, place, or manner of protected speech." *Id.*, at 2753. The Court recognized the Bandshell as a "public forum for performances in which the government's right to regulate expression is subject to the protections of the First Amendment." *Id.* The Court noted that even in a public forum government may impose time, place, or manner restrictions if the restrictions (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication. *Id.*, quoting, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The Court stated that the principal inquiry in determining content-neutrality is whether the government has adopted a regulation of speech because of disagreement with the message. *Id.* at 2754. The *Ward* Court elaborated:

Government regulation of expressive activity is content-neutral so long as it is 'justified without reference to the content of the regulated speech.'



*Id.*, quoting *Clark*, 468 U.S. at 293.<sup>4</sup>

Article I of New Chapter 35 sets forth in detail the purposes of the ordinance. Ladue reiterates its interests in privacy, aesthetics, safety, and maintaining property values. The Article concludes:

IT IS HEREBY DECLARED that the City of Ladue opposes discrimination based upon the content of any lawful speech or expression and that the provisions of this chapter are not intended and shall not be interpreted so as to permit any such discrimination.

Art. I, New Chapter 35. While the declarations of purpose may list recognized government interests for regulation, the regulations themselves are explicit content-based exceptions to a general prohibition of signs. Unlike the regulation in *Ward* that sought only to regulate the volume of the protected speech, not the content or even the specific technical mix of the music,<sup>5</sup> New Chapter 35 specifically looks to the content to identify exceptions to a general prohibition of all signs. New Chapter 35 suffers the same infirmities as Old Chapter 35 in that it prefers some protected speech to other speech based on content. The City thus retains in New Chapter 35 the same basic regulatory scheme as contained in the now-repealed Old Chapter 35.

The general principles of law stated in the order of this Court granting Plaintiff's request for preliminary in-

<sup>4</sup> *Ward* elaborates on the other two prongs of the test, but it is not necessary to reach those prongs in this decision.

<sup>5</sup> The majority in *Ward* noted

Any governmental attempt to serve purely aesthetic goals by imposing subjective standards of acceptable sound mix on performers would raise serious First Amendment concerns, but this case provides us with no opportunity to address those questions.

*Ward*, 109 S.Ct. at 2754-55.

junction with respect to Old Chapter 35 apply as well to New Chapter 35. Pages 4-11 of the order of this Court filed January 7, 1991, as they relate to legal analysis and not to specific references to Old Chapter 35, are incorporated herein. For the reasons stated in this Order and in the Order of this Court filed January 7, 1991, New Chapter 35, Article II, Section 35-2; Section 35-4; Section 35-5 the first sentence only as it specifies identification signs; Section 35-5 the second sentence beginning with "shall be limited. . ." and ending with "other functions"; Section 35-5 the third sentence as it relates to limitations on announcements; Section 35-8(b) the first sentence beginning with "giving only the name . . ." and ending at the end of the first sentence; Section 35-8(b) the words "and content" in the second sentence; and Section 35-10 are unconstitutional on their face. Having found the Plaintiff prevails on the merits and that Plaintiff will suffer irreparable harm absent the injunction and that the injunction is in the best interests of the public, this Court shall issue a permanent injunction.

Accordingly,

IT IS HEREBY ORDERED that Defendants' motion for summary judgment seeking a declaration that New Chapter 35 is constitutional is DENIED.

IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that an injunction issue restraining Defendants from enforcing New Chapter 35, Article II, Section 35-2; Section 35-4; Section 35-5 the first sentence only as it specifies identification signs; Section 35-5 the second sentence beginning with "shall be limited . . ." and ending with "other functions"; Section 35-5 the third sentence as it relates to limitations on announcements; Section 35-8(b) the first sentence beginning with "giving only the name . . ." and ending at the



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end of the first sentence; Section 35-8(b) the words "and content" in the second sentence; and Section 35-10.

Dated this 1st day of October, 1991

/s/ Jean C. Hamilton  
JEAN C. HAMILTON  
United States District Judge

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

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Cause No. 90-2396-C-7

MARGARET P. GILLES, *Plaintiff,*

vs.

CITY OF LADUE, *et al.,*  
*Defendants.*

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ORDER NUNC PRO TUNC

[Filed Oct. 3, 1991]

IT IS HEREBY ORDERED nunc pro tunc that the phrase "although none of their memoranda prior to the preliminary injunction cite the case" is deleted from the first sentence of the first full paragraph of page 5 of the order of this Court filed October 1, 1991; and the sentence shall now read, "Defendants maintain that *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746 (1989) represents a dramatic change in First Amendment Jurisprudence."

Dated this 3rd day of October, 1991

/s/ Jean C. Hamilton  
JEAN C. HAMILTON  
United States District Judge

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

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Cause No. 90-2396C(7)

MARGARET P. GILLES,  
*Plaintiff,*

v.

CITY OF LADUE, *et al.*,  
*Defendants.*

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ORDER

[Filed Oct. 1, 1991]

In accordance with the memorandum of this Court signed October 1, 1991, and incorporated herein,

IT IS HEREBY ORDERED that Defendants' motion for summary judgment seeking a declaration that New Chapter 35 is constitutional is DENIED.

IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that an injunction issue restraining Defendants from enforcing New Chapter 35, Article II, Section 35-2; Section 35-4; Section 35-5 the first sentence only as it specifies identification signs; Section 35-5 the second sentence beginning with "shall be limited . . ." and ending with "other functions"; Section 35-5 the third sentence as it relates to limitations on announcements; Section 35-8(b) the first sentence beginning with "giving only the name . . ." and ending at the end

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of the first sentence; Section 35-8(b) the words "and content" in the second sentence; and Section 35-10.

Dated this 1st day of October, 1991.

/s/ Jean C. Hamilton  
JEAN C. HAMILTON  
United States District Judge

## APPENDIX D

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

Cause No. 90-2396-C-7

MARGARET P. GILLES, *Plaintiff,*

vs.

CITY OF LADUE; EDITH J. SPINK, MAYOR OF THE CITY  
OF LADUE; THOMAS R. REMINGTON, GEORGE L. HENS-  
LEY, GALE S. JOHNSTON JR., ROBERT A. WOOD, ROB-  
ERT D. MUDD, GEORGE FONYO, AS MEMBERS OF THE  
CITY COUNCIL OF THE CITY OF LADUE,  
*Defendants.*

## MEMORANDUM AND ORDER

[Filed Jan. 7, 1991]

This matter is before this Court on Plaintiff's motion for a preliminary injunction to prohibit the enforcement of Ladue City Ordinance 35, Articles I and II. Plaintiff brought this action pursuant to 42 U.S.C. § 1983, challenging the constitutionality of Ordinance 35.

On December 8, 1990, Margaret Gilles (hereinafter Gilles), a resident of the Willow Hill subdivision in Ladue, Missouri, placed a 24" x 36" sign in her front yard. The sign read, "Say No to War in the Persian Gulf, Call Congress Now." The sign disappeared from her yard, and Gilles put up a second sign. This sign was taken down and thrown on the ground about ten feet from where it initially had been placed.

Having reported the apparent vandalism to the Ladue police, Gilles went to the Ladue City Hall concerning the matter. When asked what the sign said, Gilles stated its message and was then referred to the City Clerk. Although the Clerk was not present at City Hall, Gilles was given a copy of Ordinance 35 (hereinafter the ordinance), an ordinance relating to the placement of signs within the City of Ladue.<sup>1</sup> The ordinance prohibited all signs except those specifically exempted from the prohibition.<sup>2</sup> The ordinance also permitted application for varia-

<sup>1</sup> The ordinance defines "sign" as

A name, word, letter, writing, identification, description, display model, special lighting arrangement, or illustration which is placed upon, affixed to, painted or represented upon a building or structure, or any part thereof, or in any manner upon a parcel of land or lot, and which publicizes an object, product, place, activity, person, institution, organization or place of business. The word "sign" shall also include "banners", "pen-nants", "insignia", "commercial signs", "bulletin boards", "ground signs", "poster billboards", and "electric signs", wherever placed.

<sup>2</sup> Section 35-3 provides: "No sign shall be erected, constructed, painted, placed, enlarged or relocated except in conformity with the provisions of this chapter nor until a permit has been issued; provided that the repainting of display matter shall not be deemed a change.

Section 35-6 provides:

There shall be no commercial billboards in the city; and no person shall construct, erect, place, paint, display or maintain any sign for display or advertising by means of ground sign boards, free standing signs, roof sign boards, wall signs or bulletins, window signs, illuminated signs, or any other signs, whether or not of the classes herein listed, within the city, except as herein expressly authorized.

The signs hereinafter authorized shall not include, and it shall be unlawful to maintain any sign which is moving, flashing or animated.

Section 35-2 provides exemptions from the general provision as follows:



tion from its provision.<sup>3</sup> After reading the ordinance, Gilleo returned to City Hall the following day and asked to see the Clerk. Because he was absent from City Hall, she was referred to the Chief of Police. He informed Gilleo that he lacked authority to grant variation from the sign ordinance and suggested she petition the City Council.

On December 17, 1990, Gilleo petitioned the City Council, requesting a permit for unnecessary hardship under § 35-5 of the ordinance. This was the first such request received for a variation from a resident concerning a sign in the resident's own yard. Other variation requests had related to commercial signs in commercially zoned areas of Ladue. The City Council, by a unanimous vote, denied Gilleo's request for a variation.

The following signs are exempted from the provisions of this chapter:

- (a) All municipal signs.
- (b) Subdivision identification signs of a permanent character and road signs for danger, direction or identification.
- (c) Signs not exceeding one (1) square foot of display surface on a residence building stating only the name and profession of an occupant.
- (d) Health inspection signs.
- (e) Real estate signs authorized by section 35-12. (Ord. No. 812; § 16, 1-21-63)

Section 35-12 permitting "for sale" signs states in pertinent part: "It shall be permissible for the owner or authorized agent of premises to erect a ground sign advertising the sale or rental of the premises upon which it is maintained; but such sign shall not be attached to any tree, fence or utility pole, shall contain no other advertising matter and shall be not more than two (2) feet in height by three (3) feet in length.

<sup>3</sup> Section 35-5 provides for variation of the chapter provisions: "The council may grant a permit required by this chapter and permit a variation in the strict application of the provisions and requirements of this chapter where there are practical difficulties or unnecessary hardships, or where the public interest will be best served by permitting such variations."

On December 21, 1990, Gilleo filed a Motion for Temporary Restraining Order and Preliminary Injunction, challenging the ordinance as violative of the First Amendment of the Constitution. Plaintiff's motion for a temporary restraining order was denied. This Court held a hearing on the motion for preliminary injunction on December 26, 1990.

Before issuing an injunction this Court must consider (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and any injury that granting the injunction will inflict on the other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest. *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

The statutory framework for sign regulation in Ladue establishes a general prohibition against signs. §§ 35-3; 35-6. It then enumerates specific exemptions to that prohibition. Political signs or issue-related signs, such as Gilleo's, fall under the general prohibition. Various exemptions, however, specifically allow "for sale" and "for rent" signs; subdivision identification signs; certain road signs; municipal signs; residence identification signs; and health inspection signs. §§ 35-2; 35-12. The issue before this Court is whether the ordinance abridges Plaintiff's freedom of speech.

Government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). However, signs, like billboards, combine communicative and noncommunicative aspects, and government has a legitimate interest in regulating noncommunicative aspects. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981). Regulations concerning the time, place, and manner of speech are permissible if they advance a significant government interest, if they are

justified without reference to the content, and if they leave open alternative means of communicating the information. *Id.* at 516.

In *Metromedia, Inc. v. City of San Diego*, the Supreme Court considered whether a city government could limit on-site billboards to those containing commercial messages related to the on-site business, thus effectively prohibiting noncommercial speech.<sup>4</sup> The Court recognized that noncommercial speech is accorded greater protection under the First Amendment than is commercial speech. *Id.* at 513. With regard to the city ordinance provisions that permitted commercial billboards but prohibited noncommercial billboards, the Court observed that

[t]he city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city. Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.

*Id.*

In addition, because, under the ordinance's exemptions to its general ban on signs containing noncommercial advertising, some noncommercial messages might be conveyed on billboards throughout commercial or industrial zones, San Diego was impermissibly choosing "the appropriate subjects for public discourse. . . ." *Id.* at 515. Thus, by permitting exceptions to the general ban con-

<sup>4</sup> The Court also addressed whether the city could prohibit all off-site commercial billboards. The Court held that the city could prohibit all off-site commercial billboards while permitting on-site billboards. *Metromedia*, 453 U.S. at 512.

tained in the ordinance, San Diego had necessarily conceded that some communicative interests were stronger than its competing interests in aesthetics and traffic safety. *Id.* at 520. In finding the San Diego ordinance unconstitutional on its face, the Court cautioned that it was the general prohibition that created the infringement on freedom of speech, not the exception. *Id.* at 520-521.

The First Circuit Court of Appeals followed *Metromedia* in *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985). Town residents challenged the validity of town bylaws barring the posting of political signs on residential property. Signs expressly permitted included those denoting the name and/or profession of the owner or occupant of the building, temporary signs erected for a charitable cause, temporary signs relating to the sale, rental or lease of the premises or stating the name and address of the parties involved in construction on the premises, and one bulletin board for and on the premises of a public, charitable, or religious institution. *Matthews*, 764 F.2d at 59. The *Matthews* court held that the bylaw discriminated on the basis of content, in that it permitted sale, rental, and lease signs, professional office signs, contractors' advertisements, and signs for charitable or religious causes, but it prohibited political signs in all districts of the town. *Id.* at 60. The court recognized that, by giving more protection to commercial speech than to noncommercial speech, the bylaw inverted a well-established constitutional principle. *Id.* at 61. It therefore affirmed the lower court's finding that, because the bylaw violated the first amendment guarantee of freedom of speech, it was unconstitutional on its face.<sup>5</sup>

<sup>5</sup> Plaintiffs also rely on *Meros v. City of Euclid*, 594 F.Supp. 259 (N.D. Ohio 1984), *vacated*, 780 F.2d 1020 (6th Cir. 1985). The Sixth Circuit Court of Appeals vacated the decision as moot because the Ohio Court of Appeals in *City of Euclid v. Mabel*, 19 Ohio App.3d 235, 484 N.E.2d 249 (Ohio Ct. App. 1984) declared the ordinance unconstitutional. The ordinance prohibited political



In the case at bar, the Ladue ordinance exhibits the same constitutional defect discussed in the *Metromedia* and *Matthews* opinions. The ordinance bans all signs not expressly authorized. §§ 35-3; 35-6. Necessarily included in this prohibition is a ban on all noncommercial speech and, specifically, on political or issue-related signs such as Plaintiff seeks to erect in her yard. This clearly infringes freedom of speech. See, e.g., *Metromedia*, 453 U.S. at 520.

Moreover, a consideration of the exemptions to the general prohibition of the ordinance confirms that the infringement rises to the level of a constitutional violation. First, by permitting commercial signs, that is "for sale" or "for rent" signs, the City has impermissibly concluded that the communication of commercial information is of greater value than the communication of non-commercial messages. Secondly, the ordinance does exempt certain signs bearing noncommercial messages such as municipal signs, subdivision identification signs, residence identification signs, certain road signs and health inspection signs. This content selectivity with respect to noncommercial speech, however, allows the City to determine "which issues are worth discussing or debating . . . ." *Mosely*, 408 U.S. at 96. Such action by a government contravenes the First Amendment for "[t]o allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 538 (1980). Thus, the exemptions from the ordinance, which attempt to regulate signs in the City, lack content-neutrality and thereby render the ordinance unconstitutional on its face.

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lawn signs but allowed "for sale" and "for rent" signs. The state court of appeals concluded it was unconstitutional under either a facial analysis or a competing interests analysis.

Defendants assert they have a right under their police power to prohibit lawn signs to protect the privacy, safety, and aesthetic interests of Ladue. Defendants urge this Court to follow the decisions in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) and *Greer v. Spock*, 424 U.S. 828 (1976). Both cases are distinguishable, however, in that they involved public fora and specific government-created environments such as public transit vehicles and military bases. See *Metromedia*, 453 U.S. 514, n. 19.

Defendants further contend that the ordinance is both content and viewpoint neutral and that its general prohibition against signs with specified exceptions is justified by privacy, safety, and aesthetic interests. An ordinance that completely bans all political speech but that permits certain forms of commercial speech is not, however, content-neutral. See *Metromedia*, 453 U.S. at 516-17. Therefore, an analysis for a time, place, and manner restriction is both unnecessary and inappropriate.

Defendants also assert that their interests in privacy, safety, and aesthetics are compelling interests that would allow the ordinance to withstand constitutional scrutiny under the test announced in *Boos v. Barry*, 108 S.Ct. 1157, 1164-68 (1988). *Boos*, however, dealt with content-based regulation of political speech in a public forum, not with a resident attempting to exercise free speech in her own yard in a residential area.<sup>6</sup>

Similarly, the cases cited by Defendants to assert a "communal" privacy interest of the residents of Ladue are inapposite. Defendants cite *Carey v. Brown*, 447 U.S. 455, 470-71 (1980); *Rowan v. United States Post*

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<sup>6</sup> In *Boos* the Court said that content-based restrictions on political speech in a public forum must be subjected to exacting scrutiny. The government must show that the regulation is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Boos*, 108 S.Ct. at 1164 (quoting *Perry Education Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45 (1983)).



*Office Department*, 397 U.S. 728 (1970); *Kovacs v. Cooper*, 336 U.S. 77 (1949); and *Pursley v. City of Fayetteville, Arkansas*, 820 F.2d 951, 955-56 (8th Cir. 1987). Each recognizes the state's interest in protecting the privacy interests and domestic tranquility of the individual property owner from outside interruptions. None imposes restrictions on an individual property owner as is the case with the Ladue sign ordinance.

In *Rowan v. United States Post Office Department*, the Supreme Court upheld the portion of the Postal Revenue and Federal Salary Act that allowed an addressee to request the post office to order the sender of unwanted "erotically arousing or sexually provocative" material to refrain from further mailings to the addressee. *Rowan*, 397 U.S. at 730. The Court noted that Congress provided sweeping power to the individual addressee to avoid vesting the power to make any discretionary evaluation of the material in a governmental official. *Id.* at 737. Thus, the challenged statute in *Rowan* avoided placing content-based discretion in the hands of the statute drafters or those charged with enforcement.

Unlike the present case, *Kovacs v. Cooper*, *Carey v. Brown*, and *Pursley v. City of Fayetteville, Arkansas*, all involve regulation of public fora. In *Kovacs*, the Court, recognizing the state's interest in protecting privacy, upheld an ordinance banning loud speakers and amplifiers on trucks on public streets. The Court balanced the need for reasonable protection in the home against the intrusive nature of the distracting noise of vehicles equipped with sound devices. *Kovacs*, 336 U.S. at 89. The Court also noted that this was not a total ban on all sound trucks because they were still allowed in other traditional public fora such as parks or other open places. *Id.* at 85. In both *Carey v. Brown* and *Pursley v. City of Fayetteville, Arkansas*, the courts found the challenged ordinances unconstitutional while recognizing government's interest in protecting privacy. Both involved ordinances barring picketing. In *Carey*, the Supreme Court held unconstitu-

tional a state statute that generally banned picketing but exempted labor picketing. The Court determined that because the statute discriminated on the basis of the subject matter or content of the expression, it did not advance a legitimate objective, privacy, in a manner consistent with the Equal Protection Clause. *Carey*, 447 U.S. at 471. Finally, in *Pursley*, the Eighth Circuit Court of Appeals struck down a general ban on picketing in front of residences. The court recognized a reasonable time, place, and manner regulation might be appropriate to protect privacy and the sanctity of the home. *Pursley*, 820 F.2d at 955. The court found, however, that this absolute ban was not narrowly tailored and was void for overbreadth. *Id.* at 956, 957. While privacy, safety, and aesthetic interests are recognized justifications for content-neutral restrictions, the Ladue ordinance in question is not content-neutral. See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984).

Because Ordinance 35 impermissibly places greater value upon commercial than noncommercial speech and impermissibly values the content of certain noncommercial speech over that of other noncommercial speech, it is unconstitutional on its face.

It appears to the Court that the continued enforcement of Ladue Ordinance 35 will irreparably harm Plaintiff. Similarly, it appears that Plaintiff will ultimately be entitled to a judgment declaring the ordinance unconstitutional on its face. The Court concludes that the Defendants should be enjoined preliminarily from enforcing Ordinance 35.

Therefore, IT IS ORDERED that an injunction issue, without security therefor.

Dated this 7th day of January, 1991.

/s/ Jean C. Hamilton  
JEAN C. HAMILTON  
United States District Judge

## APPENDIX E

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

Cause No. 90-2396C(7)

MARGARET P. GILLO, *Plaintiff,*

v.

CITY OF LADUE, *et al.,*  
*Defendants.*

## ORDER

[Filed Apr. 30, 1992]

This matter is before the Court on the application of Plaintiff's counsel, Green, Hoffmann & Dankenbring, for attorney's fees and expenses.

District Courts may award reasonable attorney's fees to prevailing parties in litigation to enforce a provision of section 1983. 42 U.S.C. § 1988. A prevailing party should ordinarily recover an attorney's fee unless special circumstances makes such an award unjust. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). The starting point or lodestar figure for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Id.* at 433. Where an attorney has obtained the results his client sought, the attorney should recover a fully compensatory fee. *Id.* at 435. A district court should consider twelve factors in determining attorney's fees: (1)

the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount of time involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). Enhancement may be warranted in exceptional cases. *Hensley*, 461 U.S. at 435.

Plaintiff seeks attorney's fees at a complex litigation rate and a 50% enhancement. This case involved one legal issue and does not reasonably warrant a complex litigation rate. Attorney's fees will be calculated at the standard rate. Plaintiff's attorneys submitted affidavits and records demonstrating that they spent 422.75 hours representing Plaintiff in this case. The Court finds the number of hours to be reasonable. The attorney's fee lodestar figure is calculated as follows:

Attorney	Standard Rate	X	Hours	=	Total
M. Margo	\$150		246.75		\$37,012.50
G. Greiman	150		61.25		9,187.50
M. Green	180		84.75		15,255.00
H. Iveson	120		30.00		3,600.00
					<u>\$65,055.00</u>

Plaintiff has the burden of justifying her entitlement to an enhancement for the contingent nature of the litigation. *Morris v. American Nat'l Can Corp.*, 941 F.2d 710, 715 (8th Cir. 1991). Plaintiff has submitted the affidavit of her own attorney and two other attorneys in the community. She has adequately established that the relevant market compensates for contingency cases as a class and that she would have faced difficulties in finding

counsel in the local market without the promise of adjustment for risk. (Affidavits of D. Harlan and M. Silverstein). While the Court finds that the affidavits establish an entitlement to enhancement under the Eighth Circuit's decision in *Morris v. American Nat'l Can Corp.*, the Court finds that a 50% enhancement in light of the circumstances of this case is unreasonable. An enhancement of 15% for the risk inherent in a contingency case of this nature is adequate and reasonable.

IT IS HEREBY ORDERED that the application of Plaintiff's counsel, Green, Hoffmann & Dankenbring, for attorney's fees and expenses is GRANTED.

IT IS FURTHER ORDERED that Plaintiff Margaret Gilleo recover of defendants \$74,813.25 for attorney's fees and \$4,099.00 for costs.

Dated this 30th day of April, 1992.

/s/ Jean C. Hamilton  
JEAN C. HAMILTON  
United States District Judge

## APPENDIX F

### Chapter 35

#### SIGNS

Art. I. Declaration of Findings, Policies, Interests, and Purposes

Art. II. In General, § 35-1—§ 35-24

#### ARTICLE I. DECLARATION OF FINDINGS, POLICIES, INTERESTS, AND PURPOSES

WHEREAS the City of Ladue, formed in 1936, has a unique heritage and was created as a specially planned community based upon the work of the renowned city planner, Harland Bartholomew;

WHEREAS the City of Ladue is predominantly a residential community, small portions of which have been zoned for commercial and industrial use;

WHEREAS the City of Ladue consists of 5,456 acres or 8.566 square miles, of which a total of approximately 84% or 5,283 acres is in residential use (including 700 acres of public and private roads), approximately 13.9% or 721 acres is in public or semi-public use such as schools, public parks, and religious institutions, approximately 1% or 51 acres is in commercial use, and approximately 2% or 102 acres is in industrial use;

WHEREAS the protection and preservation of the rights and values of privacy, aesthetics, and safety are of great importance to the residents of the City of Ladue and substantially contribute to the special ambience, quality of life, and general welfare of the community;

WHEREAS the private, residential, commercial, industrial, and public areas of the City of Ladue should be



maintained in a manner to foster the values of privacy, aesthetics, and safety; and

WHEREAS the property value in the City of Ladue and the general welfare of its residents are enhanced by the maintenance of the highest standards of privacy, aesthetics, and safety for the benefit of all its residents;

IT IS HEREBY DECLARED that the erection and placement of signs should be carefully regulated so that the signs do not substantially impinge upon the privacy, aesthetics, and safety interests of the community;

IT IS HEREBY DECLARED that the proliferation of an unlimited number of signs in private, residential, commercial, industrial, and public areas of the City of Ladue would create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and commercial architecture impair property values, substantially impinge upon the privacy and special ambience of the community, and may cause safety and traffic hazards to motorists, pedestrians, and children;

IT IS HEREBY DECLARED that the City of Ladue wishes to allow speech and expression through the medium of signs so long as the City of Ladue is protected against the proliferation of an unlimited number of signs that substantially impinge upon the City of Ladue's interests in privacy, aesthetics, and safety;

IT IS HEREBY DECLARED that the time, place, and manner of the regulation of signs described in this chapter are necessary to protect and preserve the City of Ladue's interest in privacy, aesthetics, safety and property values;

IT IS HEREBY DECLARED that the residents of the City of Ladue have numerous alternative and effective ways of expressing themselves other than through the medium of signs;

IT IS HEREBY DECLARED that the City of Ladue takes notice of R.S.Mo. § 67.317 (1986), which requires

political subdivisions of Missouri to allow "for sale" and "for lease" signs;

IT IS HEREBY DECLARED that there is a limited number of "for sale" and "for lease" signs in the City of Ladue at any given time;

IT IS HEREBY DECLARED that there is a limited number of commercial establishments in the commercial areas of the City of Ladue at any given time;

IT IS HEREBY DECLARED that there is a limited number of municipal signs, subdivision identification signs of a permanent character, road signs and driveway signs for danger, direction, or identification, health inspection signs, signs for churches, religious institutions, and schools, signs identifying public transportation stops, and signs identifying safety hazards in the City of Ladue at any given time;

IT IS HEREBY DECLARED that residence identification signs (i) assist emergency and safety personnel in providing fire, police, ambulance, and other emergency services to the public; and (ii) are small in size and are placed frequently on existing structures such as the mailbox or front wall of the principal structure. Therefore, residence identifications signs contribute materially to the public safety and welfare and do not substantially impinge upon the City of Ladue's interest in privacy, aesthetics, and maintenance of property values so as to necessitate a total ban on said signs;

IT IS HEREBY DECLARED that road signs and driveway signs for danger, direction, or identification and signs identifying safety hazards contribute materially to the public safety and welfare and do not substantially impinge upon the City of Ladue's interest in privacy, aesthetics, and maintenance of property values so as to necessitate a total ban on said signs;

IT IS HEREBY DECLARED that the allowance of all commercial and non-commercial signs in the residential, commercial, and industrial areas of the City of Ladue, other than those specifically permitted by this chapter, would permit the proliferation of signs in a manner that would substantially impinge upon the privacy, aesthetic and, to some extent, the safety interests of the City of Ladue and impair property values because of the unlimited number of signs that thereby could be erected throughout the City of Ladue;

IT IS HEREBY DECLARED that the signs permitted in this chapter either contribute substantially to the public safety and welfare or, because of their limited number, location, and size, do not substantially impinge upon the City of Ladue's interest in privacy, aesthetics, safety, and maintenance of property values so as to necessitate a total ban of all signs; and

IT IS HEREBY DECLARED that the City of Ladue opposes discrimination based upon the content of any lawful speech or expression and that the provisions of this chapter are not intended and shall not be interpreted so as to permit any such discrimination.

## ARTICLE II. IN GENERAL

### Sec. 35-1. Definitions.

For the purpose of this chapter, the following terms and words shall have the meanings respectively ascribed to them:

*Area of signs.* The entire area within a single continuous perimeter enclosing the extreme limits of such sign, except "wall signs." Such perimeter shall not include any border or structural elements lying outside and not forming an integral part of the display. The area of a wall sign shall be the height of the tallest letter or display item multiplied by the length of the sign.

*Erect* shall mean to build, construct, attach, hang, place, suspend, or affix, and shall also include the painting of wall signs.

*Ground signs* shall include any sign supported by upright or braces placed upon the ground, and not attached to any building.

*Marquee.* Marquee shall include any hood or awning of permanent construction projecting from the wall of a building above an entrance and extending over a thoroughfare.

*Office building.* A building in which any of the occupants use the space occupied therein primarily for purposes of offices.

*Person* shall mean and include any person, firm, partnership, association, corporation, company, institution, and organization of any kind.

*Sign.* A name, word, letter, writing, identification, description, or illustration which is erected, placed upon, affixed to, painted or represented upon a building or structure, or any part thereof, or in any manner upon a parcel of land or lot, and which publicizes an object, product, place, activity, opinion, person, institution, organization or place of business, or which is used to advertise or promote the interests of any person. The word "sign" shall also include "banners", "pennants", "insignia", "bulletin boards", "ground signs", "billboards", "poster billboards", "illuminated signs", "projecting signs", "temporary signs", "marquees", "roof signs", "yard signs", "electric signs", "wall signs", and "window signs", wherever placed out of doors in view of the general public or wherever placed indoors as a window sign.

*Wall signs.* Any sign erected, painted on or constructed into and as a part of the wall or exterior of a structure and not extending out from or above the wall or exterior of such structure, but forming an integral part of the



surface of such wall or exterior thereof provided that such sign may extend above the wall where there is a wall or roof structure behind all of such extension.

*Window signs.* Any sign erected, attached to the outside or inside of a window, or placed immediately inside of a window for public display purposes to persons on the outside of such building or structure. (Ord. No. 812, § 2, 1-21-63; Ord. No. 929, § 1, 10-16-67; Ord. No. 1387, § 1, 2-10-86)

#### Sec. 35-2. Signs restricted within the City.

No sign shall be erected, constructed, painted, placed, enlarged, maintained, changed or relocated except in conformity with the provisions of this chapter.

#### Sec. 35-3. Removal of nonconforming signs.

Any sign which is not erected, constructed, or maintained in accordance with the provisions of this chapter may be removed by the City and the cost thereof charged to the owner of, or person maintaining, such sign. (Ord. No. 812, § 15, 1-21-63)

#### Sec. 35-4. Limited number and size of signs permitted.

Subject to the applicable regulations herein after described, the following types of signs are permitted in the City of Ladue:

- a) Municipal signs but said signs shall not be greater than nine (9) square feet.
- b) Subdivision and residence identification signs of a permanent character but said subdivision identification signs shall not be greater than six (6) square feet and said residence identification signs shall not be greater than one (1) square foot.
- c) Road signs and driveway signs for danger, direction, or identification but said signs shall not be greater than twelve (12) square feet.
- d) Health inspection signs but said signs shall not be greater than two (2) square feet.

- e) Signs for churches, religious institutions, and schools subject to the restrictions described in Sec. 35-5.
- f) Identification signs for not-for-profit organizations not otherwise described herein but said signs shall not be greater than sixteen (16) square feet.
- g) Signs identifying the location of public transportation stops but said signs shall not be greater than three (3) square feet.
- h) Ground signs advertising the sale or rental of real property subject to the restrictions described in Sec. 35-10.
- i) Commercial signs in commercially zoned or industrial zoned districts subject to the restrictions as to size, location, and time of placement hereinafter described.
- j) Signs identifying safety hazards but said signs shall not be greater than twelve (12) square feet.

#### Sec. 35-5. Signs for churches, religious institutions, and schools.

Any church, religious institution, or school located in the city shall be permitted to erect one (1) identification sign and one (1) wall bulletin or one (1) ground sign, none of which shall be more than sixteen (16) square feet in area, when located on the premises occupied by such church, religious institution, or school. Such sign shall be limited to announcements relating to the name of such church, religious institution, or school, its services, activities or other functions, and shall be located so that it does not interfere with a motor vehicle driver's view of the public roads or of the driveway leading into or out of such church, religious institution, or school premises.

In addition, a church, religious institution, or school may erect a temporary sign during a continuous period of not



more than sixty (60) days, subject to the same limitations as to area and announcements. (Ord. No. 812, § 8, 1-21-63)

Sec. 35-6. Signs at filling stations.

In lieu of the signs authorized by other sections of this chapter, gasoline filling stations may erect one banjo type ground sign having an area of not more than twenty-five (25) square feet on each side (except where located on Lindbergh Boulevard, in which event such area shall not exceed sixty (60) square feet on each side) placed no closer to a street than the nearest edge of the road right-of-way, and having a ground clearance not less than twelve (12) feet at the bottom edge thereof, nor more than twenty-two (22) feet at the top edge thereof.

In addition, such filling stations may erect two (2) free standing signs of not more than twelve (12) square feet each, whose height aboveground at the top edge thereof shall not exceed four (4) feet; and three (3) building or window signs each having maximum dimensions of not more than two (2) feet in height, with a length not to exceed six (6) feet, and having a combined total area for the three (3) signs of not more than sixty (60) square feet; provided that where such filling station is located on a corner lot it may have four (4) such building or window signs. (Ord. No. 812, § 4, 1-21-63; Ord. No. 1197, § 1, 4-17-78)

Sec. 35-7. Signs for buildings other than filling stations, churches, religious institutions, and schools.

a) A building, other than gasoline filling station, church, religious institution, or school which is located on less than three (3) acres of ground and is occupied by a single separately owned and operated commercial or industrial establishment may have one sign attached to such building. Such sign shall be limited to twelve (12) square feet and shall not extend above the wall height of such building unless located on top of the building. In

lieu of such sign, if the building is set back further than the front setback line for structures in the applicable zoning district, a free standing sign having an area of not more than fifty (50) square feet or one (1) percent of the ground floor area of such building, whichever is smaller but not less than ten (10) square feet, may be erected on such building line.

b) A building located on three (3) acres or more of ground, which is occupied as set forth on paragraph a) of this section, and which covers not more than forty (40) per cent of the area of the tract of ground upon which it is located, may have a sign as provided in said paragraph a) with an area of not more than two hundred sixty (260) square feet; and where such sign is placed on a building located on Lindbergh Boulevard there is permitted in addition thereto a free standing sign having an area of not more than one hundred twenty-five (125) square feet, located anywhere within the property lines of the premises.

c) In addition to the signs permitted by paragraphs a) and b) of this section, such establishments may have one (1) window sign with an area of two (2) square feet for each ten (10) linear feet of window frontage on the street where displayed, but may have two (2) such signs in any event.

d) When such building is located on a lot bordered by two (2) or more streets, or at the intersection of a street and an area used by the public for vehicular traffic, the signs permitted by paragraphs a), b), and c) of this section shall be permitted on two (2) of such travelled areas. (Ord. No. 812, § 6, 1-21-63; Ord. No. 1197, § 1, 4-17-78)

Sec. 35-8. Signs for office buildings.

A building which is occupied to any extent as an office building or to any extent as an arcade building with busi-

ness establishments not fronting on a public street may have the following signs, to wit:

- a) Each commercial and industrial establishment occupying any portion of the ground floor of such building and facing a public street may have the signs permitted by Sec. 35-9.
- b) The occupants using a portion of the building for offices and those occupants having business establishments not fronting on a public street may have one (1) sign for all such occupants giving only the name and address of the building, and the name and one business of each of said occupants. The area of such sign shall not exceed sixteen (16) square feet, and it shall be located on the wall of such building adjacent to the entrance thereto, or it may be a ground sign similarly limited as to area and content, located adjacent to or near the front property line of the premises. (Ord. No. 812, § 5, 1-21-63; Ord. No. 929, § 1, 10-16-67)

Sec. 35.9. Signs for buildings other than office or arcade.

a) A building other than an office or arcade building which is occupied by more than one industrial or commercial establishment, may have one (1) sign attached to such building for each such occupant facing a public street. All such signs shall be limited to twelve (12) square feet and shall not extend above the wall height of the building except when located on top of the building; and no sign shall extend out over either end of the building.

b) In addition to the sign permitted by paragraph a) of this section each of said separate business establishments may have the window signs that are authorized by paragraph c) of Sec. 35-7.

c) When the portion of the building occupied by such establishment is located on a corner of two (2) intersecting streets, or at the intersection of a street and an area used by the public for vehicular traffic, the signs permitted by paragraphs a) and b) of this section shall be permitted on each of such intersecting traveled areas. (Ord. No. 812, § 7, 1-21-63; Ord. No. 1197, § 1, 4-17-78)

Sec. 35-10. For sale and for lease signs.

It shall be permissible for the owner or authorized agent of an owner with an interest in real property to erect a single ground sign advertising the sale or rental of the real property upon which it is maintained; but such sign shall not be attached to any tree, fence or utility pole, and shall be not greater than six (6) square feet. Such sign may only state: (a) that the property is for sale, lease or exchange by the owner or his agent; (b) the owner's or agent's names; and (c) the owner's or agent's address or telephone number.

Sec. 35-11. Illuminated, moving, flashing, or animated signs.

No one shall install or maintain more than one illuminated sign among the signs permitted by this chapter, and no sign shall be illuminated otherwise than by electricity. All illuminated signs shall be construed entirely of metal or other incombustible materials, except the insulation thereof, including the uprights, supports and braces for the same, and if on a building shall be properly and firmly attached to the building and constructed so as not be or become dangerous. The illumination provided shall be limited to the minimum amount necessary to allow the text or the sign to be read. Such sign shall be illuminated only during the business hours of the sign user.

It shall be unlawful to install, construct, place, display, or continue to maintain any sign which is moving, flashing, or animated.



#### Sec. 35-12. Roof signs.

Every roof sign shall be constructed entirely of steel construction, including the upright supports and braces of the same, and must be so constructed as to withstand a wind pressure of not less than thirty (30) pounds to the square foot of area subject to such pressure. When a roof sign is erected on a building which is not constructed entirely of fireproof materials, the bearing plates of said sign shall bear directly upon the masonry, walls, or upon the steel girders which are supported on the masonry walls and intermediate columns of such building. All roof signs shall be thoroughly secured to the building upon which they are installed by iron or metal anchors, bolts, supports, chains, stranded cables, steel rods, or braces. (Ord. No. 812, § 11, 1-21-63)

#### Sec. 35-13. Free standing, ground signs.

No free standing or ground sign (other than banjo signs of gasoline filling stations) shall be at any point more than fifteen (15) feet above the ground level, and every such sign shall have an open space of not less than two (2) feet between the lower edge of such sign and the ground level. All ground signs shall be designated and constructed so as to be safe from falling and to withstand wind pressures of not less than thirty (30) pounds to the square foot of area subject to such pressure. (Ord. No. 812, § 12, 1-21-63)

#### Sec. 35-14. Permit Required.

No sign permitted under Sections 35-6, 35-7, 35-8, 35-9, 35-11 and 35-12 shall be erected, constructed, painted or placed upon any building or premises within the City until a permit therefore has been issued by the City Clerk. (Ord. No. 812, § 13, 1-21-63)

#### Sec. 35-15. Application.

No sign permit shall be issued until after an application therefor has been filed with the City Clerk accompanied

by duplicate scale or dimensional drawings showing the plans and specifications, dimensions, the material of which said sign is to be constructed, the details of construction thereof, including loads, stresses, and anchorage, the estimated cost thereof, and in the case of ground signs the proposed location with reference to street lines and the walls of adjacent buildings, if any. When a proposed sign is to be attached to a building or other independent structure, the drawings shall show the position of the sign on the supporting structure, the method of attachment to such structure and the character of the structural member to which such attachment is made. It shall be the duty of the Building Commissioner to review said plans and specifications and make written report to the City Clerk within fifteen (15) business days after filing of a permit application, as to compliance with the provisions of this Section.

All applications for permits to erect signs shall be filed by the owner of the premises, or shall be accompanied by written consent of such owner, the lessee, or agent of the property upon which said sign is to be erected. (Ord. No. 812, § 13, 1-21-63)

#### Sec. 35-16. Issuance.

Within thirty (30) days after the filing of a permit application that conforms to the provisions of Section 35-15, the City Clerk shall issue a permit upon determining that the provisions of this Chapter have been complied with, including approval by the Building Commissioner of the plans and specifications in compliance herewith. An application for a permit shall be deemed granted if the Building Commissioner does not file his report and the City Clerk does not issue a written denial within thirty (30) days after the filing of such permit application.

#### Sec. 35-17. Appeal upon denial.

Any person who believes that he has been improperly denied a permit for a sign that conforms to the require-



ments of this Chapter may appeal to the City Council for a permit. Within sixty (60) days after the filing of an appeal, the City Council shall issue a permit upon determining that all the provisions of this Chapter have been complied with. A permit shall be deemed granted if the City Council does not issue a written denial within sixty (60) days after the filing of such appeal.

Sec. 35-18. Prevention of corrosion.

All signs which are not galvanized or constructed of approved corrosion-resistive, noncombustible materials shall be painted whenever necessary to prevent corrosion. (Ord. No. 812, § 14, 1-21-63)

Sec. 35-19. Maintenance of premises near sign.

It shall be the duty and responsibility of the owner of, or person maintaining, a sign to maintain the immediate premises occupied by the sign in a clean, sanitary and healthful condition. (Ord. No. 812, § 14, 1-21-63)

Sec. 35-20. Inspection of signs.

All signs may be inspected by the Building Commissioner or someone appointed by him to determine if the sign is insecure, in danger of falling, or otherwise unsafe.

Sec. 35-21. Notice to remove unsafe sign.

When any sign becomes insecure, in danger of falling, or otherwise unsafe, or if any sign exists or is installed or maintained in violation of the provisions of this chapter with respect to construction or safety, the owner, person or firm maintaining such sign shall correct the deficiencies or violation or remove the sign within ten (10) days after receiving notice from the City Clerk; provided, however, that if such sign constitutes an immediate danger to the public health, safety or welfare, the Building Commissioner shall order immediate correction or removal of such sign. (Ord. No. 812, § 14, 1-21-63)

Sec. 35-22. Limited variation of chapter provisions.

The City Council may grant a limited variation from the strict application of the provisions and requirements of this chapter, but such variation may only be granted as to the size or location of a sign or the number of signs permitted on a person's property, and only if the Council determines that the variation in the particular circumstances is consistent with the policies, interests, and purposes stated in Article I of this ordinance. When considering a request for a variation, the Council shall not consider the content of any sign, and shall not depart from the strict requirements of this chapter in any respect other than those specifically permitted by this section.

Sec. 35-23. Application to existing signs.

The provisions of this chapter shall apply to the erection, alteration, reconstruction, construction, and maintenance of all signs within the city; however, all existing signs that have previously been allowed by ordinance or approved by permit shall be permitted.

Sec. 35-24. Severability of parts of this chapter.

The sections, paragraphs, clauses, and phrases of this chapter are severable and if any phrase, clause, sentence, paragraph, or section of this chapter shall be declared unconstitutional or otherwise unlawful by the valid judgment, decree, or injunction order of a court of competent jurisdiction, such ruling shall not affect any of the remaining phrases, clauses, sentences, paragraphs, and sections of this chapter. In the event that, contrary to the policies, interests, and values of the City of Ladue, a court of competent jurisdiction issues a judgment, decree, or injunction order that this chapter is unconstitutional or otherwise unlawful because of any omission or prohibition in this chapter, then all provisions of this chapter not specifically declared to be unconstitutional or otherwise unlawful shall remain in full force and effect and

all signs not already specifically regulated in Sections 35-4 to 35-23 shall be permitted but shall not be greater than six (6) square feet. In the event that a judgment, decree, or injunction order declaring all or a portion of this chapter to be unconstitutional or otherwise unlawful is reversed or vacated by a court of competent jurisdiction, the provisions contained in this chapter shall remain in full force and effect.

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No. 92-1856

IN THE  
**SUPREME COURT OF THE UNITED STATES**  
October Term, 1992

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CITY OF LADUE, ET AL.,  
*Petitioners,*

vs.

MARGARET P. GILLES,  
*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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BRIEF OF RESPONDENT, MARGARET P. GILLES,  
IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1992

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No. 92-1856

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CITY OF LADUE, *ET AL.*,  
*Petitioners,*

vs.

MARGARET P. GILLEO,  
*Respondent.*

---

On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eighth Circuit

---

Brief Of Respondent, Margaret P. Gilleo,  
In Opposition To Petition For Writ Of Certiorari

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**STATEMENT OF THE CASE**

In order to promote its view of municipal aesthetics, the City of Ladue, Missouri ("Petitioners" or "Ladue") sought to completely prohibit its residents from displaying certain disfavored yard signs on their own property. Among the disfavored yard signs are all signs of a political nature. The First Amendment, however, forbids a municipality from restraining speech in this fashion, as the District Court and Court of Appeals properly recognized in this case. Indeed, we are aware of no federal or state case holding that a governmental entity may prohibit its citizens from placing small



signs on their own property expressing their views on important public issues. This case was properly decided below. It is not a difficult case. There is no basis for granting certiorari.

In early December, 1990, Margaret P. Gilleo ("Respondent" or "Ms. Gilleo") obtained a small sign which expressed her political views regarding the United States' involvement in the Persian Gulf. The sign, which was approximately twenty-four (24) inches by thirty-six (36) inches, read "Say No To War in the Persian Gulf, Call Congress Now." Ms. Gilleo was informed by Ladue officials that the sign was in violation of Ladue City Ordinances, Chapter 35, Articles I and II, *et seq.* ("Old Chapter 35"). Pursuant to Old Chapter 35, Ms. Gilleo petitioned the City Counsel for permission to place her sign in her front yard. Her petition was unanimously denied.

On January 21, 1991, after Respondent had initiated this action and obtained a preliminary injunction preventing the enforcement of Old Chapter 35, the Ladue City Council hurriedly repealed Old Chapter 35 and enacted a new Chapter 35 ("New Chapter 35") in its place. (Ladue App. F, at 35a.)<sup>1</sup>

New Chapter 35 is virtually identical to Old Chapter 35 with regard to the preferential treatment of commercial speech over political, non-commercial speech and a selective valuing of some types of non-commercial speech over others. Like Old Chapter 35, New Chapter 35 contains a general proscription against signs, and then proceeds to except certain types of signs from the general ban. New Chapter 35 permits "For Sale" and "For Rent" signs, municipal signs, subdivision and resident identification signs, road signs, health inspection signs, religious signs and school signs. (New Chapter 35, Ladue App. F, Sections 35-4, 35-7, 35-10). New Chapter 35 also extends exceptions to the general ban to

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1. References to "Res. App." are to the Appendix to this Brief. References to "Ladue Pet." and "Ladue App." are to Petitioner's Petition for a Writ of Certiorari and its Appendix respectively.

driveway signs (Sec. 35-4c), signs for not-for-profit organizations (Sec. 35-4f), public transportation signs (Sec. 35-4g) and safety hazard signs (Sec. 35-4j).<sup>2</sup>

Following enactment of New Chapter 35, Ms. Gilleo placed another sign inside the front second story window of her home, which she was informed similarly violated Ladue's New Chapter 35. The second sign was eleven (11) inches by eight and one-half (8 1/2) inches and stated "For Peace in the Gulf." (Res. App. 1) On cross motions for summary judgment the District Court permanently enjoined Ladue from enforcing New Chapter 35 and Ladue appealed.

The United States Court of Appeals for the Eighth Circuit affirmed the District Court's order, holding that "the ordinance favors commercial speech over non-commercial speech, and it favors certain types of non-commercial speech over others." *Gilleo v. City of Ladue*, 986 F.2d 1180, 1182 (8th Cir. 1993) (Ladue App. at 4a) (footnote omitted).<sup>3</sup>

The Court of Appeals also rejected Ladue's claim that its ordinance was constitutional based on the "secondary effects" doctrine enunciated by this Court in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-49, 106 S. Ct. 925, 929-30 (1986). First, the Court of Appeals expressed doubt that the secondary effects doctrine was applicable in this case or in any way diminished the precedential value of *Metromedia, Inc. v. City*

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2. The main difference between the new and old ordinances is that the new ordinance contains a highly conclusory and self-serving preamble, obviously intended to try to buttress Ladue's position in this litigation. (Ladue App. F at 35a).

3. The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation, authored the opinion, with Circuit Judge Morris Sheppard Arnold and Senior Circuit Judge Floyd R. Gibson concurring.

of *San Diego*, 453 U.S. 490, 101 S. Ct. 2882 (1981), as Ladue had argued. Then the Court of Appeals assumed for sake of argument that the doctrine extended to cases involving the prohibition of pure political speech on private property, and still held "the prohibited signs are no more associated with the particular secondary effects than many of the permitted signs under Ladue's ordinance." Ladue App. at 5a-6a. *Accord City of Cincinnati v. Discovery Network, Inc.*, \_\_\_ U.S. \_\_\_, 113 S. Ct. 1505, 1514 (1993) ("The city has asserted an interest in aesthetics, but Respondent publishers' newsracks are no greater an eyesore than the newsracks permitted...")

Finally, the Eighth Circuit held that Ladue's New Chapter 35, as a content-based restriction, had to survive strict scrutiny and be narrowly tailored. *Gilleo, supra*, 986 F.2d at 1184. Ladue App. at 6a-7a. Thereafter, the Eighth Circuit made short work of New Chapter 35, stating: "We have no trouble concluding that Ladue's ordinance is not the least restrictive alternative. Therefore, we affirm the District Court's holding that Ladue's ordinance is unconstitutional." *Gilleo, supra*, 986 F.2d at 1184. Ladue App. at 7a.

Despite two District Court Orders and one unanimous Court of Appeals opinion, Ladue would like this Court to find what no other court would—a content-neutral ordinance and a compelling state interest that outweighs all First Amendment rights.

## REASONS FOR DENYING THE PETITION

### I. MS. GILLEO'S YARD SIGN REPRESENTS PURE POLITICAL SPEECH ENTITLED TO THE UTMOST DEGREE OF FIRST AMENDMENT PROTECTION AND LADUE'S CONTENT-BASED PROHIBITION IS NEITHER NECESSARY TO FULFILL A COMPELLING STATE INTEREST NOR NARROWLY DRAWN.

The First Amendment protects the rights of all citizens to express their views, regardless of popularity. It embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 721 (1964).

Outdoor signs and posters are a time-honored means of exercising First Amendment free speech rights:

The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or "broadside" to the billboard, outdoor signs have played a prominent role throughout American history rallying support for political and social causes.

*Metromedia, supra*, 453 U.S. at 501, 101 S. Ct. at 2889 (quoting lower court dissenting opinion of Justice Clark at 610 P.2d 430-31)<sup>4</sup>.

Recognizing, however, that free speech is not an absolute, this Court has developed certain permitted "time, place and manner" restrictions on free speech when such restrictions are not related to

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<sup>4</sup> The small sign chosen by Ms. Gilleo to articulate her views is clearly "pure speech," the most highly protected mode of free speech under the First Amendment, because it is not combined with conduct.



the content of the speech. Having declared that it cannot live with an unrestricted number of signs, however, Ladue has attempted to limit signs not in a neutral fashion, but rather by picking and choosing among various types, categories and messages of signs, decreeing that some will be allowed and others prohibited.

The fact that New Chapter 35 imposes a blanket prohibition against all political speech, rather than favoring or disfavoring particular viewpoints, does not make the ordinance content neutral. Justice White rejected just such an argument in *Metromedia, supra*:

The First Amendment's hostility to content based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.

453 U.S. at 519, 101 S. Ct. at 2898; *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 537, 100 S. Ct. 2326, 2333 (1980).

In *Ladue*, what determines whether a particular type of sign is prohibited or allowed is not its size, duration of display, point of placement, design, material used in its construction or similar criteria, but its content. Thus, a thirty-six (36) inch by twenty-four (24) inch sign stating "House for Sale by Owner, call XXX-XXXX" is permitted, while virtually identical signs stating "Car for Sale by Owner, call XXX-XXXX" or "For Peace in the Gulf, Call Congress Now" are prohibited. A one foot square sign stating "The Jones Family" is allowed, but a smaller sign in the same location stating "Peace on Earth" is prohibited.<sup>5</sup>

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<sup>5</sup> It is interesting to note that *Ladue's* sign ordinance prohibits the display of flags. New Chapter 35 defines "sign" to include any "illustration" which "publicizes an ... opinion," including "banners" and "pennants." *Ladue* has gone through gyrations at all judicial levels, desperately but unsuccessfully, attempting to distinguish a flag from a banner or pennant. *Ladue* now claims that a "banner" is an elongated

As a content-based restriction, the ordinance must be subjected to "exacting scrutiny." *Burson v. Freeman*, \_\_\_ U.S. \_\_\_, 112 S. Ct. 1846, 1850 (1992). Such a restriction can only be justified if its proponent shows that it "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Burson, supra*, quoting *Perry Education Association v. Perry Local Educators-Association*, 460 U.S. 37, 45, 103 S. Ct. 948, 955 (1983). "[A] law rarely survives such scrutiny..." *Id.* at 1852.

The alleged compelling state interests put forth by *Ladue* in an effort to justify New Chapter 35 are "privacy, aesthetics, safety and maintenance of real estate values." *Ladue Pet.* at 2. Very simply, we know of no case in any U.S. jurisdiction in which such considerations were deemed to be compelling state interests sufficient to warrant the prohibition of pure political speech on a person's own private property. There are, however, a number of cases in which these asserted interests have been deemed insufficient to justify sign bans. See *Baldwin v. Redwood City*, 540 F.2d

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rectangle (as opposed to a flag which is a regular rectangle) and a "pennant" is a rectangle tapered to a point. *Ladue Pet.* at 2, n. 3. These distinctions make no sense. Who can state with any certainty when a rectangle becomes "elongated" and thus violates *Ladue's* ordinance? Respondent submits that compared to the flag of Switzerland or that of the Vatican City, which are square, the United States flag is an elongated rectangle. It is not as elongated, however, as the flags of the countries of Qatar or Bahrain.

*Ladue's* definition of a "pennant" as a "rectangle tapered to a point" is even more curious. This shape sounds suspiciously like a triangle and presumably *Ladue's* ordinance might then ban the flag of Nepal which is actually a pentagon that looks like two triangles set on top of each other.

*Ladue*, it seems, is arguing that what distinguishes between a banned flag or sign and an allowed flag or sign is its shape. Both of Ms. Gilleo's prohibited signs, however, are of a nearly identical shape to that of the American Flag. All of these points serve to illustrate the content-based and indefensible nature of *Ladue's* ordinance.



1360, 1366 (9th Cir. 1976), *cert. den.* 431 U.S. 913 (1977); *Tauber v. Town of Longmeadow*, 695 F. Supp. 1358, 1361 (D. Mass. 1988); *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985). While the interests identified by Ladue may be significant governmental interests, they are not the kind of compelling interests which can justify content-based prohibitions of pure speech.

In addition, even if Petitioners were able to meet the compelling state interest requirement, Ladue's ordinance still would have to satisfy the further requirement that it be "narrowly drawn." *Burson, supra*, 112 S. Ct. at 1851. In other words, Petitioners would need to show that New Chapter 35 is the least drastic means available for achieving its purpose. *Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157 (1988). Petitioners cannot meet that test.

Without commenting on the constitutionality of the following possible restrictions, it seems simply a matter of common sense that if Ladue's true intent was to protect against a proliferation of signs, Petitioners could have attempted to restrict political, non-commercial signs in any one of the following ways:

- Petitioners could have attempted to restrict the size of any given sign, as they have done with resident identification signs (6 square feet); driveway signs (12 square feet); health inspection signs (2 square feet); not-for-profit organization signs (16 square feet); and "For Sale" signs (6 square feet). New Chapter 35 at Sec. 35-4.
- Petitioners could have attempted to restrict the number of signs that any one resident could place on his or her property, as they have done with "For Sale" and "For Rent" signs. Sec. 35-10.

- Petitioners could have attempted to restrict the number of signs allowable in any subdivision within the City during a given period of time.
- Petitioners could have attempted to restrict the placement of signs to a certain number of feet back from the road, as they have done with church and school signs. Sec. 35-5.
- Petitioners could have attempted to restrict the amount of time that any particular sign could be displayed before a re-application would be necessary, as they have done with church and school signs. Sec. 35-5.

Petitioners have chosen instead to ban all political non-commercial signs. Such action is not the "least restrictive" means to accomplish Ladue's expressed goals of being protected against a proliferation of an unlimited number of signs.<sup>6</sup>

## II. THE SUPREME COURT'S *METROMEDIA V. CITY OF SAN DIEGO* OPINION IS STILL GOOD LAW.

Petitioners argue that the plurality opinion in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882 (1981), is not good law and that the Court of Appeals and District Court were mistaken in relying on *Metromedia* to find Ladue's ordinance

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<sup>6</sup> The alleged difference between signs like Ms. Gilleo's, which Petitioners claim will proliferate, and permitted signs which they claim "do not proliferate" (Ladue Pet. at 13), is non-existent. In truth, there is no limit in Ladue to the number of most permitted signs. A resident could place "resident identification" signs all over her house or yard. A resident could erect numerous "driveway signs" of twelve (12) square feet each, as long as the signs announced pot-holes or directed someone to "Beware of Dog" or to "Keep Out." (See New Chapter 35, Sec. 35-4). The permitted signs are limited only by the good judgment of Ladue's residents—the same judgment that would prevent a proliferation of political signs.

to be unconstitutional. (Ladue Pet. at 7). Ladue's contention is not well-taken.

The principles which the Court of Appeals and District Court drew from *Metromedia* are that it is constitutionally impermissible to place greater value upon commercial speech than on non-commercial speech and to value the content of certain non-commercial speech over that of other non-commercial speech. The logic of this reasoning is self-evident, and this Court has never overruled the *Metromedia* decision.<sup>7</sup>

Further, the *Metromedia* holding that it is constitutionally impermissible to favor commercial over non-commercial speech is merely an application of the principle, articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563, 100 S. Ct. 2343, 2350 (1980), that the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." The decision in *Central Hudson Gas* was a majority decision, and the Supreme Court has repeatedly reaffirmed the principle that non-commercial speech is vested with greater constitutional value than commercial speech in subsequent cases. See *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 109 S. Ct. 3028 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 102 S. Ct. 2875 (1983); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S. Ct. 1912 (1978).

Accordingly, the principles set forth in *Metromedia*, on which the Court of Appeals and District Court relied, remain good law, should continue to be followed, and are not in need of review.

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<sup>7</sup> Petitioners argue that *Discovery Network* obliterates all *Metromedia* distinctions between the First Amendment protections given commercial versus non-commercial speech. This is simply not true. *Discovery Network*, *supra*, 113 S. Ct. at 1514, n. 20.

### III. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ON ANY ISSUE THAT WOULD BE CONTROLLING IN THIS LITIGATION.

Petitioner's laundry list of reasons why this Court should grant its Petition for a Writ of Certiorari includes the statement that there is a conflict among the Circuit Courts on general First Amendment principles that apply to sign ordinances. The cases cited by Petitioners, however, belie their contention. These cases fall into two categories. Some are on all fours with this case, in that the courts struck down restrictions of non-commercial speech on private property, or upheld ordinances providing exceptions for non-commercial speech. *Arlington County Republican Committee v. Arlington County Virginia*, 983 F.2d 587, 595 (4th Cir. 1993); *National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 150 (2nd Cir. 1991); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 248-49 (9th Cir. 1988); *Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985). The other cases cited by Petitioners address onsite/offsite advertising or commercial speech. *Messer v. City of Douglasville, Georgia*, 975 F.2d 1505 (11th Cir. 1992), *cert. den.* 61 USLW 3773 (May 17, 1993); *Wheeler v. Commissioner of Highways, Commonwealth of Kentucky*, 822 F.2d 586 (6th Cir. 1987), *cert. den.* 484 U.S. 1007 (1988); *Lindsay v. City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987); *Harnish v. Manatee County, Florida*, 783 F.2d 1535 (11th Cir. 1986). There is no conflict pertaining to the issues presented by the present case.

### IV. CITY OF CINCINNATI V. DISCOVERY NETWORK, INC., HAS NO BEARING ON THE REASONING OR ANALYSIS OF THIS CASE.

Petitioners attempt to seize upon a recently decided Supreme Court First Amendment case in support of their position. However, that case, *City of Cincinnati v. Discovery Network*, \_\_\_ U.S. \_\_\_, 113 S. Ct. 1505 (1993), is a very strong case for Respondent. The City of Cincinnati, like Ladue, argued that it was motivated only by its concern to reduce the overall number of newsracks on its



streets, maintain aesthetics and provide safety for its residents, and that its elimination of commercial newsracks was content neutral and a reasonable fit to accomplish its purposes. In the course of striking down the ordinance, this Court commented that the City's argument "attaches more importance to the distinction between commercial and non-commercial speech than our cases warrant and seriously underestimates the value of commercial speech." *Discovery Network, supra*, 113 S. Ct. at 1511. Petitioners have interpreted this comment to mean that the Supreme Court has brought non-commercial speech down to the protection level of commercial speech and have placed the holdings of *Metromedia* and its progeny in jeopardy. This interpretation is not supportable and should be ignored.<sup>8</sup>

In striking down Cincinnati's ordinance as unconstitutional, this Court adopted language that is as applicable to Ladue as it was to Cincinnati:

Cincinnati has enacted a sweeping ban that bars from its sidewalks, a whole class of constitutionally protected speech... The regulation is not a permissible regulation of commercial speech, for on this record it is clear that the interests that Cincinnati has asserted are unrelated to any distinction between "commercial handbills" and "newspapers." Moreover, because the ban is predicated on the content of the publications distributed by the subject newsracks, it is not a valid time, place or manner restriction on protected speech.

*Id.* at 1517.

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<sup>8</sup> This Court also dispensed with Cincinnati's other claimed interests by stating that with regard to aesthetics and safety, any distinction between commercial and non-commercial newsracks bears no relationship whatsoever to the City's alleged interests. *Id.* at 1514. Here, also, there is no relationship whatsoever between Ladue's asserted interest in avoiding a proliferation of signs and the banning of only certain types of signs depending upon their content.

**V. THE COURT OF APPEAL'S OPINION DOES NOT JEOPARDIZE THE CONSTITUTIONALITY OF THE HIGHWAY BEAUTIFICATION ACT AND WAS NOT CRITICIZED BY THE UNITED STATES.**

Ladue erroneously states that the Court of Appeals' opinion in this case raises questions about the constitutionality of the Federal Highway Beautification Act of 1965. These arguments are a red herring. The Highway Beautification Act, 23 U.S.C. § 131, clearly states in its title and preamble that its purpose is to "control... outdoor advertising." 23 U.S.C. at § 131(a). Petitioners ignore this express statement of legislative intent. Moreover, the Federal statute is limited to industrial and commercial property, 23 U.S.C. § 131(d), and Ms. Gilleo seeks only to place a small political sign on her front lawn or inside the window of her home.

If this Court has any concerns about the Highway Beautification Act, those concerns can be addressed when a Petition for Certiorari is filed in a case which presents issues directly relating to that Act. This case is not an appropriate vehicle for addressing such issues.

Ladue also argues that in a case pending before the United States Court of Appeals for the Third Circuit, *Rappa v. McNulte*, No. 92-7493 (3rd Cir.), argued January 20, 1993, "The Justice Department sharply criticized the Eighth Circuit's opinion as reflecting the confusion in the lower courts as to the proper First Amendment analysis that should be applied to governmental regulations of signs." (Ladue Pet. at 27).

This interpretation of the Justice Department *Amicus Curiae* filing is misguided and misleading.

The Justice Department's 50-page brief ("DOJ Brf.") contains three references to the present case. Two are merely string citations following a citation to *Metromedia*. The third is in a statement by the DOJ that, in its opinion, offsite advertising is far more



prone to proliferate than onsite advertising and that the Court of Appeals here rejected that argument. *DOJ Brf.* at 36. Actually, contrary to the DOJ's statement, the Court of Appeals below did not address the issue of offsite proliferation because it was not presented in this case. The Court of Appeals merely pointed out that Ladue lacked factual support for its proliferation argument and further criticized New Chapter 35 for placing content-based and content-neutral limitations on onsite commercial signs—signs Ladue itself claimed are "naturally limited" and not likely to proliferate. *Gilleo, supra*, 986 F.2d at 1183 n.7.

This case involves only private, residential property with no onsite/offsite issues. The Petitioners refusal to recognize this fact and their contention that Ms. Gilleo's small window sign and similar yard signs "should be classified as offsite signs" (Ladue Pet. at 28 n. 18) is simply absurd.

### CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

*Respectfully submitted,*

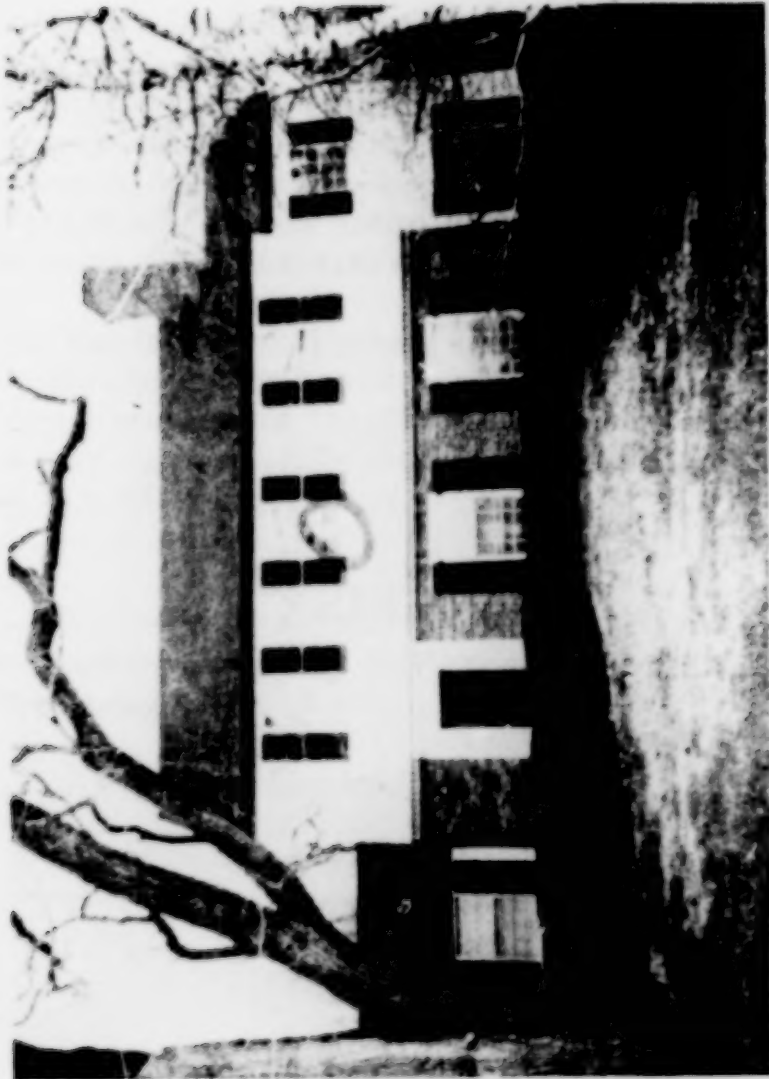
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June 21, 1993

### APPENDIX

—1a—



*Photograph of Ms. Gilleo's house showing sign (circled) in middle upstairs window.*

—2a—



*Close-up photograph of sign reading "For Peace in the Gulf." The display of this sign violated Ladue New Chapter 35.*

NOV 15 1993

CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

CITY OF LADUE, EDITH J. SPINK, MAYOR OF THE CITY OF  
LADUE, THOMAS R. REMINGTON, GEORGE L. HENSLEY,  
GALE F. JOHNSTON, JR., ROBERT A. WOOD, ROBERT  
D. MUDD, JOYCE T. MERRILL, AS MEMBERS OF THE  
CITY COUNCIL OF THE CITY OF LADUE,

*Petitioners,*  
v.

MARGARET P. GILLES,  
*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Eighth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 21, 1993  
CERTIORARI GRANTED OCTOBER 4, 1993

**BEST AVAILABLE COPY**

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI

No. 90-2396-C-7

CHRONOLOGICAL DOCKET ENTRIES

DATE	PROCEEDINGS
12/20/90	VERIFIED COMPLAINT fld. NON-JURY. (eod 12/20/90 HB)
12/20/90	Memorandum for Clerk fld. by deft. in re: Entry of Appearance by Jordan B. Cherrick on behalf of deft. as co-counsel w/ F. Douglas O'Leary of Moser & Marsalek. (eod 12/28/90 HB)
12/20/90	Motion for Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not Issue w/ Memorandum, Proposed Order, Affidavits of Margaret P. Gilleo, Landon Y. Jones, Calvin F. Dierberg, and Sally H. Gulick in support fld. by plff. (eld 12/20/90 HB)
12/20/90	Courtroom Minute Sheet for Hearing fld. Atty for plff.—Mitchell A. Margo, atty for deft.—Jordan Cherrick. Parties present for hearing on plff's motion for temporary restraining order. Hearing commenced and concluded. TRO motion of plff is DENIED by the Court. Preliminary injunction hearing scheduled for 12/26/90 at 2:00 p.m. (eod 1/8/91 HB)
12/21/90	Notice of Deposition of Calvin Deirberg on 12/24/90 at 10:00 a.m. fld. by plff. (eod 1/8/91 HB)
12/21/90	Notice of Depositions of E.C. Hankins on 12/24/90 at 9:00 a.m., Sally H. Gulick on 12/24/90 at 9:00 a.m., Thomas R. Remington on 12/24/90 at 10:00 a.m., and Edith J. Spink on 12/24/90 at 11:30 a.m. fld. by plff. (eod 1/8/91 HB)

DATE	PROCEEDINGS
12/21/90	Notice of Deposition of Margaret P. Gilleo on 12/24/90 at 12:00 noon fld. by defts. (eod 1/8/91 HB)
12/26/90	Memorandum for Clerk fld. by defts. in re: defts granted leave to file Memorandum in Opposition to Plff's Motion for Preliminary and Permanent Injunctive Relief in excess of 15 pages. SO ORDERED (JCH) by endorsement thereon. (eod 1/8/91 HB)
12/26/90	Memorandum in Opposition to Plff's Motion for Preliminary and Permanent Injunctive Relief fld. by defts. (eod 1/8/91 HB)
12/26/90	Motion for Preliminary Injunction w/ Proposed Order and Memorandum in Support fld. by plff. (eod 1/8/91 HB)
12/26/90	Memorandum for Clerk fld. by Craig Liddy courtroom clerk in re: courtroom minutes. Parties present for preliminary injunction hearing. Cause taken under submission. (eod 1/8/91 HB)
12/26/90	Exhibit list of parties fld. (eod 1/8/91 HB)
12/26/90	Witness list of parties fld. (eod 1/8/91 HB)
12/28/90	Objections to Deposition Questions fld. by defts. (eod 1/8/91 HB)
12/28/90	Reply Memorandum in Support of Motion for Preliminary Injunction fld. by plff. (eod 1/8/91 HB)
12/28/90	Memorandum for Clerk fld. by defts. in re: deft granted leave to file brief in excess of 15 pages. SO ORDERED (JCH) by endorsement thereon. (eod 1/8/91 HB)
12/28/90	Reply Memorandum in Opposition to Plff's Motion for Preliminary and Permanent Injunctive Relief fld. by defts. (eod 1/8/91 HB)

DATE	PROCEEDINGS
1/7/91	MEMORANDUM AND ORDER (JCH), fld. ORDERED that an injunction issue, w/o security therefor. (eod 1/8/91 HB) cc: attys
12/26/90	Exhibits fld. Exhibits Envelope #1. (eod 1/11/91 HB)
12/26/90	Exhibits fld. Exhibits Envelope #2. (eod 1/11/91 HB)
12/26/90	Deposition of E.C. Hankins, taken on behalf of plff on 12/24/90, fld. (eod 1/11/91 HB)
12/26/90	Deposition of Thomas R. Remington, taken on behalf of plff on 12/24/90, fld. (eod 1/11/91 HB)
12/26/90	Deposition of Mayor Edith J. Spink, taken on behalf of plff on 12/24/90, fld. (eod 1/11/91 HB)
<del>12/26/90</del>	Deposition of Chief Calvin Dierberg, taken on behalf of plff on 12/24/90, fld. (eod 1/11/91 HB)
1/18/91	Transcript of Hearing Re: Temporary Restraining Order Before the Honorable Jean C. Hamilton on 12/26/90 at 2:00 p.m. recorded by Karen Moore, transcribed by Deborah A. Carter, fld. (eod 1/23/91 HB)
1/23/91	Certificate of Service of motion fld. by plff. (eod 1/24/91 HB)
1/23/91	Motion to Vacate Preliminary Injunction and Dismiss Plff's Complaint as Moot fld. by defts. (eod 1/24/91 HB) (Ref: 4/11/91)
1/23/91	Motion to Modify Preliminary Injunction w/ proposed Modified Preliminary Injunction Order in support fld. by plff. (eod 1/24/91 HB) (Ref: 4/11/91)
1/22/91	COURTROOM MINUTE SHEET fld. Atty for plff —Mitchell Margo, atty for deft—Jordan Cherrick. Parties present for hearing on deft's motion to vacate judgment. Hearing commenced and con-



DATE	PROCEEDINGS
	cluded. Parties to file a time schedule for the filing of briefs with the Court. All pending motions will then be submitted to Court. (eod 1/28/91 HB)
1/28/91	AMENDED COMPLAINT fld. by plff. (eod 1/30/91 HB)
1/30/91	ANSWER to plff's Amended Complaint fld. by defts. (eod 1/31/91 HB)
2/5/91	Courtroom Minute Sheet fld. Atty for plff: Mitchell Margo, attys for deft: Jordan Cherrick and Jay Summerville. Parties present for pretrial conference. Hearing commenced and concluded. Memo to be fld. re: scheduling of pleadings to be fld. (eod 2/6/91 HB)
2/5/91	Memorandum for Clerk fld. by parties in re: Procedural schedule is as follows, subject to modification by the Court for good cause shown and in the interest of justice: 1) Defts to file counterclaim by 2/7/91, 2) Plff to file answer to defts' counterclaim and motion for summary judgment on or before 2/11/91, 3) Defts to file response to plff's motion for summary judgment and their cross-motion for summary judgment on/before 2/27/91, 4) Plff to file response to defts' cross-motion for summary judgment on/before 3/6/91; 5) Defts to seek leave to file reply to plff's response to deft's cross-motion for summary judgment, if at all, and shall file such reply, if leave is granted, on/before 3/13/91; 6) Upon receipt of plff's responsive papers as referred to above, defts may file their motion for an evidentiary hearing if necessary, for determination by the Court. Defts have agreed, in order to expedite final submission and presentation of the merits of the issues in dispute, they shall not enforce new Chapter 35 of the Ladue City Code as it affects non-commercial speech until the disposition of the cross-motions for sum-

DATE	PROCEEDINGS
	mary judgment although defts aver and believe that said Chapter is constitutional, a claim plff disputes. Parties have agreed that each shall telecopy a copy of each pleading fld. to opposing counsel on the same day of filing w/ the Court in addition to service by mail. SO ORDERED (JCH), by endorsement thereon. (eod 2/6/91 HB) cc: attys
2/7/91	COUNTERCLAIM fld. by defts. (eod 2/8/91 HB)
2/11/91	Motion for Leave to file Memorandum in Support of Plff's Motion for Summary Judgment and Permanent Injunction in excess of 15 pages fld. by plff. SO ORDERED (JCH), by endorsement thereon. (eod 2/12/91 HB) cc: attys
2/11/91	Motion for Summary Judgment and Permanent Injunction w/ Memorandum in Support fld. by plff. (eod 2/12/91 HB) (Ref: _____)
2/11/91	ANSWER to Deft's Counterclaim fld. by plff. (eod 2/12/91 HB)
	2/11/91—Motion to modify preliminary injunction fld. by plff 1/23/91 submitted to Judge Hamilton. (eod 2/12/91 HB)
	2/11/91—Motion to vacate preliminary injunction and to dismiss complaint fld. by defts on 1/23/91 submitted to Judge Hamilton (eod 2/12/91 HB)
2/27/91	Memorandum for Clerk fld. by defts in re: defts granted leave to file Suggestions in Support of Motion for Summary Judgment and in Opposition to Plff's Motion for Summary Judgment in excess of 15 pages. SO ORDERED (JCH), by endorsement thereon. (eod 3/1/91 HB) cc: attys
2/27/91	Memorandum for Clerk fld. by defts in re: defts granted to 3/4/91 to file response to plff's motion for summary judgment and their own motion for

DATE	PROCEEDINGS
	summary judgment; plffs granted to 3/18/91 to file response to deft's motion for summary judgment and reply to defts' response. SO ORDERED (JCH), by endorsement thereon. (eod 3/1/91 HB) cc: attys
2/27/91	Motion for Leave to File Amended Counterclaim w/ proposed Amended Counterclaim and exhibits in support fld. by defts. (eod 3/1/91 HB) (Ref: 4/11/91)
3/4/91	Motion for Oral Argument on Motion for Summary Judgment fld. by defts. (eod 3/6/91 HB) (Ref: _____)
3/4/91	Motion for Summary Judgment w/ Exhibits (2 accordion folders and 2 maps), Attached Exhibits, and Suggestions in Support fld. by defts. (eod 3/6/91 HB) (Ref: _____)
3/4/91	Answer to Amended Counterclaim RECEIVED FROM plff—not filed until Amended Counterclaim is fld. (eod 3/6/91 HB)
3/4/91	Motion for Leave to File Second Amended Complaint w/ proposed Second Amended Complaint in Support. (eod 3/6/91 HB) (Ref: 4/11/91)
3/6/91	Letter fld. by deft in re: signature pages of affidavits. (eod 3/7/91 HB)
3/6/91	Joint Answer to Plff's Second Amended Complaint RECVD—not filed until 2nd Amd Complaint is fld.—from defts. (eod 3/7/91 HB)
3/14/91	Memorandum for Clerk fld. by plff in re: plff granted to 3/21/91 to file reply to Defts' Suggestions in Opposition to Plff's Motion for Summary Judgment and in Support of Defts' Motion of Summary Judgment. SO ORDERED (SNL), by endorsement thereon. (eod 3/14/91 HB) cc: attys

DATE	PROCEEDINGS
3/15/91	Motion for leave to file amended counterclaim fld. by defts on 2/27/91 submitted to Judge Hamilton. (eod 3/18/91 HB)
3/15/91	Motion for oral argument on motion for summary judgment fld. by defts on 3/4/91 submitted to Judge Hamilton. (eod 3/18/91 HB)
3/15/91	Motion for leave to file second amended complaint fld. by plff 3/4/91 submitted to Judge Hamilton. (eod 3/18/91 HB)
3/21/91	Reply to Defts' Suggestions in Support of Their Motion for Summary Judgment and Opposition to Plff's Motion for Summary Judgment fld. by plff. (eod 3/22/91 HB)
3/22/91	Exhibit A in Support of Plff's Reply to Defts' Suggestions in Support of their Motion for Summary Judgment and Opposition to Plff's Motion for Summary Judgment fld. by plff. (eod 3/25/91 HB)
3/27/91	Affidavit of Edith Spink w/ Videotape Exhibit in Support fld. by defts. (eod 4/2/91 HB)
4/10/91	1 Box of Exhibits placed in Exhibit Room on 1M. (eod 4/10/91 HB)
4/10/91	Letter fld. by deft in re: 8th Circuit opinion in ACORN v. St. Louis County. (eod 4/12/91 HB)
4/11/91	ORDER (JCH), fld. HEREBY ORDERED plff's motion to modify preliminary injunction is DENIED as moot. FURTHER ORDERED defts' motion to vacate preliminary injunction and dismiss plff's complaint is DENIED. FURTHER ORDERED plff's motion for leave to file a second amended complaint is GRANTED. FURTHER ORDERED defts' motion for leave to file an amended counterclaim is GRANTED. (eod 4/12/91 HB) cc: attys

DATE	PROCEEDINGS
4/11/91	ORDER (JCH), fld. HEREBY ORDERED that the parties shall have 20 days to file additional simultaneous briefs on the subject of this Court's jurisdiction over the second amended complaint and the amended counterclaim. FURTHER ORDERED that the parties' motions for summary judgment will be considered after the briefs on the jurisdictional issue are submitted. (eod 4/12/91 HB) cc: attys
4/11/91	SECOND AMENDED COMPLAINT fld. by plff. (eod 4/12/91 HB)
4/11/91	JOINT ANSWER TO PLFF'S SECOND AMENDED COMPLAINT fld. by defts. (eod 4/12/91 HB)
4/11/91	AMENDED COUNTERCLAIM fld. by defts. (eod 4/12/91 HB)
4/11/91	ANSWER TO DEFTS' AMENDED COUNTERCLAIM fld. by plff. (eod 4/12/91 HB)
4/12/91	Letter to Judge Hamilton fld. by plff in re: 8th Circuit opinion in ACORN v. St. Louis County. (eod 4/15/91 HB)
4/18/91	Suggestions in Response to Court Order fld. by plff. (eod 4/19/91 HB)
4/22/91	Motion for Leave to Amend Their Answer and their Amended Counterclaim by Interlineation fld. by defts. LEAVE GRANTED (JCH), by endorsement thereon. (eod 4/23/91) HB) cc: attys
4/22/91	Amendments by Interlineation fld. by defts. (eod 4/23/91 HB)
5/1/91	Suggestions in Response to Court Order Respecting Jurisdictional Issue fld. by defts. (eod 5/2/91 HB)

DATE	PROCEEDINGS
	5/14/91—Briefs fld. by parties on 4/18/91 and 5/1/91 and pending motions for summary judgment submitted to Judge Hamilton. (eod 5/16/91 HB)
10/1/91	MEMORANDUM AND ORDER (JCH) IT IS HEREBY ORDERED that defts. motion for summary judgment seeking a declaration that new chapter 35 is constitutional is DENIED. IT IS FURTHER ORDERED that plttf.'s motion for summary judgment is GRANTED. IT IS FURTHER ORDERED that an injunction issue restraining defts. from enforcing new chapter 35, article II, section 35-2; section 35-4; section 35-5 the first sentence only as it specifies identification signs; section 35-5 the second sentence beginning with "shall be limited . . ." and ending with "other functions"; section 35-5 the third sentence as it relates to limitations on announcements; section 35-8(b) the first sentence beginning with "giving only the name . . ." and ending at the end of the first sentence; section 35-8(b) the words "and content" in the second sentence; and section 35-10. Fld. cc: attys. (eod 10/3/91 ca)
10/1/91	ORDER (JCH) IT IS HEREBY ORDERED that defts. motion for summary judgment seeking a declaration that new chapter 35 is constitutional is DENIED. IT IS FURTHER ORDERED that plttf.'s motion for summary judgment is GRANTED. IT IS FURTHER ORDERED that an injunction issue restraining defts from enforcing new chapter 35 article II, section 35-2; 35-4; 35-5 the first sentence only as it specifies identification signs; etc. Fld. cc: attys. (eod 10/3/91 ca)
10/3/91	LETTER to Judge Hamilton from defts. (sc)
10/3/91	ORDER NUNC PRO TUNC (JCH) fld., It is hereby ordered nunc pro tunc that the phrase "although none of their memoranda prior to the pre-



DATE	PROCEEDINGS
	liminary injunction cite the case" is deleted from the first sentence of the first full paragraph of page 5 of the order of this Court filed October 1, 1991; and the sentence shall now read, "Defendants maintain that <i>Ward v. Rock Against Racism</i> , 491 U.S. 781, 109 S.Ct. 2746 (1989) represents a dramatic change in First Amendment jurisprudence." cc: attys (sc)
10/8/91	OPINIONS of 1/7/91, 10/1/91 and 10/3/91 PUBLISHED (sc)
10/9/91	MOTION to alter or amend the court's October 1, 1991 order and judgment w/suggestions in support by defts. (REF ———) (cm)
10/15/91	OPPOSITION to defts' motion to alter or amend court's order and judgment by plttf. (cm)
10/21/91	APPLICATION for attys. fees and expenses fld. by plttf. w/affidavit of Mitchell Margo. REF. ———. (sc)
10/29/91	EXTENSION OF TIME—defts granted until 11/7/91 to file response to plttf's application for award of attys' fees and expenses. SO ORDERED (JCH) cc: attys. (cm)
11/7/91	OPPOSITION to application of plttf's counsel for atty's fees and expenses by defts. (cm)
11/13/91	EXTENSION OF TIME—plttfs' granted until 11/18/91 to file reply to defts' objections to the application of Green, Hoffman & Dankenbring for attys' fees and expenses. SO ORDERED (JCH) cc: attys. (cm)
11/18/91	REPLY to defts' opposition to application of plttf's counsel for attys fees and expenses by plttf. (cm)
11/20/91	SUPP'L AFFIDAVIT of Mitchell A. Margo, fld. (cm)
4/23/92	OPINIONS OF 1/7/91 and 10/1/91 PUBLISHED (sc)

DATE	PROCEEDINGS
4/30/92	ORDER (JCH) IT IS HEREBY ORDERED that defts. mtn. to alter or amend the court's 10/1/91 order and judgment is DENIED. Fld. cc: attys. (ca)
4/30/92	ORDER (JCH) IT IS HEREBY ORDERED that the application of plttf.'s counsel, Green, Hoffmann & Dankenbring for atty.'s fees and expenses is GRANTED. IT IS FURTHER ORDERED that plttf. Margaret Gilleo recover of defts. \$74,813.25 for atty.'s fees and \$4,099.00 for costs. Fld. cc: attys. (ca)
5/12/92	ORDER OF 4/30/92 PUBLISHED. (sc)
5/27/92	NOTICE OF APPEAL Filed by Deft. with Form A appealing ORDER of 4/30/92 (JCH) approving application for attorney's fees by plaintiff's counsel. Fee Paid. Receipt #85211. (pm)
5/27/92	NOTICE OF APPEAL filed by Deft. with Form A appealing ORDER (JCH) of 4/30/92 denying Deft. motion to alter or amend ORDER (JCH) of 10/1/91 denying Deft. motion for summary judgment. Fee paid. Receipt #85212. (pm)
6/1/92	DELIVERED TO U.S.C.A. 1 civil cover sheet, 2 cert. cc of NOA, 2 cert. cc of clerk's docket entries, 2 cc of ORDER (JCH) filed 4/30/92 granting plttf. awarded atty. fees, cc: NOA to Judge Hamilton. cc: NOA, clerk's docket entries and U.S.C.A. ltr. of 10/19/84 to parties. (pm)
6/1/92	DELIVERED TO U.S.C.A. 1 civil cover sheet, 2 cert. cc. of NOA, 2 cert. cc of Clerk's docket entries, 2 cc of ORDER (JCH) of 4/30/92 denying Deft. motion to amend or alter ORDER of 10/1/91 (JCH) denying Deft. motion for summ. judg. cc: NOA to Judge Hamilton; cc: NOA & clerk's docket entries & U.S.C.A. ltr. of 10/19/84 to parties. (pm)

DATE	PROCEEDINGS
6/24/92	ORDER (USCA) fld., appellants have moved for an order directing the district court clerk to transmit the entire file including all exhibits, for use in this appeal, appellant's motion is granted and the district court is directed to transmit his file in this matter.
	6/29/92—File forwarded to USCA. (sc)
7/8/92	RECEIPT from USCA.—1 vox of exhibits. (jh).
06/08/92	BRIEFING SCHEDULE from U.S.C.A.: TRANSCRIPT due N/A JOINT APPENDIX due 07/27/92. (mef)
	U.S.C.A. NUMBER 92-2232 EMSL
2/22/93	OPINION, (USCA) USDC is modified and affirmed. Atty's fees award is reduced to \$65,055.00 (kec)
3/19/93	MANDATE fld. by USCA
3/31/93	SATISFACTION of judgment. Fld. by plttf. (ca)
5/5/93	CORRECTED PAGES 6, 7 & 8 of Opinion of February 22, 1993, issued by Court. (jh).
6/2/93	NOTICE of filing petition for certiorari fld. by City of Ladue. (sc)

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

\_\_\_\_\_  
No. 92-2232 and 92-2235  
\_\_\_\_\_

CHRONOLOGICAL DOCKET ENTRIES

DATE	PROCEEDINGS
6/4/92	Civil Case Docketed. (lkl) [92-2232]
6/4/92	CERTIFIED copies notice of appeal, docket entries, [92-2232] and order of 4/30/92 from district court [167090] (lkl) [92-2232]
6/4/92	BRIEFING SCHEDULE: Method of apndx due on 6/15/92 in 92-2232, in 92-2235 DR aplnt due on 6/15/92 in 92-2232, in 92-2235 DR aplee due on 6/25/92 in 92-2232, in 92-2235 Apndx due on 7/27/92 in 92-2232, in 92-2235 Aplnt brief due on 8/26/92 in 92-2232, in 92-2235 reply brief due on 9/9/92 in 92-2232, in 92-2235 (lkl) [92-2232 92-2235]
6/5/92	APPEARANCE for appellant, attorney Jordan Bernard Cherrick in 92-2232 [167974] (cah) [92-2232]
6/12/92	REMARKS: Separate appendices will be filed. (bap) [92-2232]
6/12/92	MOTION of aplnts City of Ladue, et al, in 92-2232, to order the district court to forward its entire record to the court of appeals. [92-2232] [172341] (bap) [92-2232]
6/18/92	ORDER filed: granting apellant motion to order the district court to forward its entire record to the court of appeals [172341-1] by Appellants City of Ladue, et al, [92-2232] [172348]: Appellants have moved for an order directing the dis-

DATE	PROCEEDINGS
	trict court clerk to transmit his entire file in case no. 90-2396-C-7, including all exhibits, to this court for use during the appeal. Appellants' motion is granted, and the district court clerk is hereby requested to transmit his file in this matter. (bap) [92-2232]
6/23/92	APPEARANCE for appellee, attorney Mitchell A. Margo in 92-2232 [174507] (bap) [92-2232]
6/29/92	RECORDS received: Original File, consisting of 2 Volume(s), (in box) Location STL. [92-2232, 92-2235] (raw) [92-2232 92-2235]
6/29/92	RECORDS received: Transcript, consisting of one Volume(s). (hearing on restraining order) (filed in box). Location STL. [92-2232] (raw) [92-2232 92-2235]
6/29/92	RECORDS received: (one brown folder in box) (4) Depositions of E.C. Hawkins, Thomas R. Remington, Mayor Edith J. Spink, Chief Calvin Dierberg. Location STL [92-2232, 92-2235] (raw) [92-2232 92-2235]
6/29/92	RECORDS received: Exhibits, (in box) Located in: STL, consisting of 2 large wallets, 1 brown expandable folder. [92-2232, 92-2235] (raw) [92-2232 92-2235]
7/9/92	RECORDS received: Exhibits, Located in: STL, consisting of one box containing two accordion folders (one labeled "Spink Affidavit Exhibits", one labeled "Drummond Affidavit Exhibits"), one video tape (Exh. HH), two rolled-up poster-size Exhibits (one labeled "Drummond K", one labeled "Drummond L"). [92-2232, 92-2235] (raw) [92-2232 92-2235]
7/20/92	MOTION of aplnts City of Ladue, et al, in 92-2232 and 92-2235, for extension of time to file brief. [92-2232, 92-2235] [92-2232, 92-2235] [184180] (bap) [92-2232 92-2235]

DATE	PROCEEDINGS
7/21/92	ORDER filed: granting appellant motion for extension of time to file brief [184180-1] by Appellants City of Ladue, et al, [184183] in 92-2232, 92-2235 Aplnt brief now due on 8/12/92 in 92-2232, in 92-2235 (bap) [92-2232 92-2235]
8/7/92	MOTION of aplnt City of Ladue, et al, in 92-2232, City of Ladue, et al, in 92-2235, to file overlength brief of 60 pages [92-2232, 92-2235] [192377] (bap) [92-2232 92-2235]
8/11/92	ORDER filed: granting apellant motion to file overlength brief of 60 pages [192377-1] by Appellants City of Ladue, et al. [92-2232, 92-2235] [192380] in 92-2232, 92-2235 (bap) [92-2232 92-2235]
8/11/92	MOTION of applnt City of Ladue, et al, in 92-2232, City of Ladue, et al, in 92-2235, for extension of time to file brief. [92-2232, 92-2235] [92-2232, 92-2235] [92-2232, 92-2235] [192385] (bap) [92-2232 92-2235]
8/11/92	ORDER filed: granting appellant motion for extension of time to file brief [192385-1] by Appellants City of Ladue, et al [192387] in 92-2232, 92-2235 Aplnt brief now due on 8/19/92 in 92-2232, in 92-2235 (bap) [92-2232 92-2235]
8/19/92	BRIEF OF APPELLANT. 60 pgs (City of Ladue, et al, in 92-2232, City of Ladue, et al, in 92-2235), w/addendum 12 Copies. w/service 8/19/92 [92-2232, 92-2235] (bap) [92-2232 92-2235]
8/19/92	RECORDS received: Appendix filed by Appellants City of Ladue, et al, in 92-2232, Appellants City of Ladue, et al, in 92-2235, consisting of 2 Volume(s), 4 Copies. [92-2232, 92-2235] (bap) [92-2232 92-2235]
8/25/92	MOTION of aplee Margaret P. Gilleo in 92-2232, Margaret P. Gilleo in 92-2235 for extension of time to file brief. [92-2232, 92-2235] [197704] (bap) [92-2232 92-2235]



DATE	PROCEEDINGS
8/27/92	ORDER filed: granting appellee motion extension of time to file brief. [197704-1] by Appellee Margaret P. Gilleo, Margaret P. Gilleo [197914] in 92-2232, 92-2235 Aplee brief now due on 9/28/92 in 92-2232, in 92-2235 (bap) [92-2232 92-2235]
9/24/92	MOTION of aplee Margaret P. Gilleo in 92-2232 and 92-2235 for extension of time to file brief. [92-2232, 92-2235] [209245] (tab) [92-2232 92-2235]
9/28/92	ORDER filed: granting in part appellee motion extension of time to file brief. [209248] in 92-2232, 92-2235. Aplee brief now due on 10/16/92 in 92-2232 and 92-2235. NO FURTHER EXTENSIONS. (tab) [92-2232 92-2235]
10/8/92	Record Sent out of the office for use by the District Court. Records Included: 1 vol. hrg. TR; (to be returned to this office). [92-2232, 92-2235] (raw) [9-2232 92-2235]
10/16/92	BRIEF OF APPELLEE. 40 pgs (Margaret P. Gilleo in 92-2232, Margaret P. Gilleo in 92-2235) w/addendum 10 Copies w/service 10/16/92 [92-2232, 92-2235] (bap) [92-2232 92-2235]
10/19/92	TO SCREENING to Motion Practice Unit. [92-2232, 92-2235] (ljg) [92-2232 92-2235]
10/23/92	RETURNED from Screening (20) [92-2232, 92-2235] (lcd) [92-2232 92-2235]
10/27/92	MOTION of aplnt City of Ladue, et al, in 92-2232, aplee City of Ladue, et ad, in 92-2235, for extension of time to file reply brief. [92-2232, 92-2235] [220456] (bap) [92-2232 92-2235]
10/28/92	ORDER filed: granting appellant motion extension of time to file reply brief [220456-1] by Appellants City of Ladue, et al, Appellees City of Ladue, et al, [220458] in 92-2232, 92-2235 Reply brief now due on 11/16/92 in 92-2232, in 92-2235 (bap) [92-2232 92-2235]

DATE	PROCEEDINGS
11/5/92	RECORDS received: Exhibits, Located in: STL, consisting of one white envelope containing video tape (Exh. HH). (This is a duplicate of video tape received 7/9/92; see 179557). (Supplied by attorney for Appellant, Jordan Cherrick; return at end of proceedings). [92-2232, 92-2235] (raw) [92-2232 92-2235]
11/11/92	MOTION of aplnt City of Ladue, et al, in 92-2232, City of Ladue, et al, in 92-2235, for extension of time to file reply brief. [92-2232, 92-2235] [226321] (bap) [92-2232 92-2235]
11/11/92	ORDER filed: granting appellant motion extension of time to file reply brief [226321-1] by Appellants City of Ladue, et al, [226326] in 92-2232, 92-2235. Reply brief now due on 12/2/92 in 92-2232, in 92-2235. (bap) [92-2232 92-2235]
11/30/92	*SET FOR ARGUMENT*—January, 1993 in St. Louis. [92-2232, 92-2235] (lcd) [92-2232 92-2235]
11/30/92	MOTION of aplnt City of Ladue, et al, in 92-2232, 92-2235 to file overlength reply brief of 35 pages [92-2232, 92-2235] [233058], for extension of time to file reply brief. [92-2232, 92-2235] [233058] (bap) [92-2232 92-2235]
12/1/92	ORDER filed: granting in part appellant motion motion to file overlength reply brief of 35 pages [233060] in 92-2232, 92-2235, granting appellant motion extension of time to file reply brief [233058-2] by Appellants City of Ladue, et al, [233060] in 92-2232, 92-2235 Reply brief now due on 12/8/92 in 92-2232, in 92-2235. Reply brief shall not exceed 30 pages. (bap) [92-2232 92-2235]
12/8/92	REPLY BRIEF. 30 pgs (City of Ladue, et al, in 92-2232, City of Ladue, et al, in 92-2235) 10 Copies w/service 12/8/92 [92-2232, 92-2235] TO HEARING PANEL. (bap) [92-2232 92-2235]

DATE	PROCEEDINGS
12/18/92	MOTION of aplee Margaret P. Gilleo in 92-2232 and 92-2235 to Reschedule Oral Argument from 1/13/93 until next available court session [240682] [92-2232, 92-2235], TO COURT. (lcd) [92-2232 92-2235]
12/18/92	RESPONSE of aplnt, City of Ladue, Edith J. Spink, Thomas R. Remington, George L. Hensley, Gale S. Johnston, Robert A. Wood, Robert D. Mudd, George Fonyo, City of Ladue in 92-2232 and 92-2235, in opposition to appellee motion to Reschedule Oral Argument by Margaret P. Gilleo [240682-1] [240703] in 92-2232, 92-2235. TO COURT. (lcd) [92-2232 92-2235]
12/29/92	JUDGE ORDER by MSA, FRG, TMR denying appellee motion to Reschedule Oral Argument. [240682-1] filed by Margaret P. Gilleo [243046] in 92-2232, 92-2235 (lcd) [92-2232 92-2235]
1/13/93	APPEARANCE for appellee, attorney Gerald Phillip Greiman in 92-2232 [92-2232] [249162] (cgj) [92-2232]
1/13/93	ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES Morris S. Arnold, Circuit Judge, Floyd R. Gibson, Senior Judge, Thomas M. Reavley, Visiting Judge (5th Circuit Senior Judge, Austin, Texas) Jordan Cherrick for Appellants George Fonyo, Appellants Robert D. Mudd, Appellants Robert A. Wood, Appellants Gale S. Johnston, Appellants George L. Hensley, Appellants Thomas R. Remington, Appellants Edith J. Spink, Appellants City of Ladue in 92-2232, Gerald Phillip Greiman for Appellee Margaret P. Gilleo in 92-2232. Jordan Bernard Cherrick for Appellants George Fonyo, Appellants Robert D. Mudd, Appellants Robert A. Wood, Appellants Gale S. Johnston, Appellants George L. Hensley, Appellants Thomas R. Remington, Appellants Edith J. Spink, Appellants City of Ladue in 92-2235, Gerald P. Greiman

DATE	PROCEEDINGS
	for Appellee Margaret Gilleo in 92-2235. Rebuttal by: Jordan Cherrick. RECORDED. [92-2232, 92-2235] (cgj) [92-2232 92-2235]
1/13/93	28(j) citation received and filed from Appellee Margaret P. Gilleo in 92-2232, Appellee Margaret P. Gilleo in 92-2235 TO COURT. [92-2232, 92-2235] (jlm) [92-2232 92-2235]
1/21/93	RESPONSE to 28(j) citation received from Appellants City of Ladue et al in 92-2232, Appellants City of Ladue et al in 92-2235. TO COURT. (jlm) [92-2232 92-2235]
1/25/93	RESPONSE of aplee, Margaret P. Gilleo in 92-2232, Margaret P. Gilleo in 92-2235, in opposition to appellant response to 28j citation—TO COURT. by City of Ladue, Edith J. Spink, Thomas R. Remington, George L. Hensley, Gale S. Johnston Jr., Robert A. Wood, Robert D. Mudd, George Fonyo, City of Ladue, Edith J. Spink, Thomas R. Remington, George L. Hensley, Gale S. Johnston Jr., Robert A. Wood, Robert D. Mudd, George Fonyo [240703-1] in 92-2232, 92-2235. (jlm) [92-2232 92-2235]
2/22/93	THE COURT: Morris S. Arnold, Floyd R. Gibson, Thomas M. Reavley OPINION filed by Thomas M. Reavley PUBLISHED [92-2232, 92-2235] [264752] (ema) [92-2232 92-2235]
2/22/93	JUDGMENT: Morris S. Arnold, Floyd R. Gibson, Thomas M. Reavley: The judgment of the district court is AFFIRMED in accordance with the opinion. The court's attorneys' fee award is reduced to \$65,055.00. [92-2232, 92-2235] [264754] (ema) [92-2232 92-2235]
3/5/93	MOTION of aplee Margaret P. Gilleo in 92-2232 for attorney fees. [92-2232, 92-2235] [269954] (jlm) [92-2232 92-2235]

DATE	PROCEEDINGS
3/15/93	MOTION of aplnt City of Ladue in 92-2232, City of Ladue, et al, in 92-2235 for extension of time to file response to attorneys fees. [92-2232, 92-2235 [273527] (jlm) [92-2232 92-2235]
3/16/93	ORDER filed: granting apellant motion ext. to file resp to atty fees [273527-1] [92-2232, 92-2235] [273529] in 92-2232, 92-2235 (jlm) [92-2232 92-2235]
3/19/93	MANDATE ISSUED [92-2232, 92-2235] (rmh) [92-2232 92-2235]
3/19/93	Record Sent out of the office to lower court at the end of appellate proceedings. Records Included: 2 vols. OF; 1 folder deposition trs, #s, 3, 4, 5, 6, & 1 tr. of Hearing Re: Temporary Restraining Order. TR; 2 boxes containing 2 expandable folders containing (Misc.) exhs. in env. #1 & #2.; 1 folder containing 2 defts' Motion for summary Judgment & 2 defts' Suggestion in Support of their Motion for Summary Judgment & in Opposition to Plaintiff's Motion for Summary Judgment; 1 folder containing Drummond Affit. exhs (Defts' motion for Summary judgment), Drummond, B, C, D, E, F, G, H, I, J, (K & L) are rolled), M, N, O, P, Q, R, S, T, U, V, W, X, Y & Z: Drummond AA, BB, CC, DD, EE, FF, GG, HH, II, & JJ.: Spink CC, DD, EE, FF & env. containing Exhs. A-Z; Spinks AA, BB, (Photos);, Exh;. [92-2232, 92-2235] (rmh) [92-2232 92-2235]
3/22/93	MOTION of aplnt City of Ladue, et al, in 92-2232, City of Ladue, et al, in 92-2235 for extension of time to file response to attorneys fees. [92-2232, 92-2235] Response due 3/23/93. [276381] (jlm) [92-2232 92-2235]
3/22/93	ORDER filed: granting appellant motion ext. to file resp to atty fees [276381-1] [92-2232, 92-2235] [276408] in 92-2232, 92-2235 (jlm) [92-2232 92-2235]

DATE	PROCEEDINGS
3/23/93	RESPONSE of aplnt, City of Ladue, et al, in 92-2232, City of Ladue, et al, in 92-2235, in opposition to appellee motion for attorney fees by Margaret P. Gilleo [269954-1] [92-2232, 92-2235] [277311] in 92-2232, 92-2235. TO COURT. (jlm) [92-2232 92-2235]
3/25/93	RESPONSE of aplee, Margaret P. Gilleo in 92-2232, Margaret P. Gilleo in 92-2235, in reply to appellants' objections to appellee's motin for attorneys' fees. TO COURT. (jlm) [92-2232 92-2235]
3/31/93	RECEIPT for Mandate. [92-2232, 92-2235] [280726] (rmh) [92-2232 92-2235]
4/8/93	JUDGE ORDER: granting appellee motion for attorney fees with the reduction of the hourly charges to accord with the award of the district court judge. [269954-1] [92-2232, 92-2235] [283948] in 92-2232, 92-2235 (jlm) [92-2232 92-2235]
4/30/93	FEDERAL CITATION: 986 F.2d 1180 (1993) [92-2232, 92-2235] (rlc) [92-2232 92-2235]
5/4/93	Opinion CORRECTION. Specifically pages 6, 7, 8. [92-2232, 92-2235] (jlm) [92-2232 92-2235]
5/28/93	RECEIVED courtesy copies of their petition for writ of certiorari—from Jordan Bernard Cherrick for Appellants George Fonyo, Appellants Robert D. Mudd, Appellants Robert A. Appellants Gale S. Johnston, Appellants George L. Hensley, Appellants Thomas R. Remington, Appellants Edith J. Spink, Appellants City of Ladue in 92-2232 [92-2232, 92-2235] (jlm) [92-2232 92-2235]
6/2/93	U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 05/21/93. Supreme Ct. Case No.: 92-1856 [92-2232, 92-2235] [306263] (jlm) [92-2232 92-2235]



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

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Cause No. 90-2396-C-7

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MARGARET P. GILLES, *Plaintiff,*  
vs.

CITY OF LADUE, EDITH J. SPINK, MAYOR OF THE CITY  
OF LADUE, THOMAS R. REMINGTON, GEORGE L.  
HENSLEY, GALE S. [sic] JOHNSTON, JR., ROBERT A.  
WOOD, ROBERT D. MUDD, GEORGE FONYO, AS MEM-  
BERS OF THE CITY COUNCIL OF THE CITY OF LADUE,  
*Defendants.*

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VERIFIED COMPLAINT

Filed December 20, 1990

Comes now Margaret P. Gilles and, for her Complaint,  
states as follows:

*Parties*

1. Plaintiff is a citizen and resident of the State of Missouri, residing in St. Louis County, Missouri, within the City of Ladue.

2. Upon information and belief, Defendant City of Ladue is a Class 4 City located within St. Louis County and the State of Missouri. Defendant Spink is the Mayor of Ladue and a member of the City Council. Defendants Remington, Hensley, Johnston, Wood, Mudd and Fonyo are members of the Ladue City Council.

*Jurisdiction And Venue*

3. Plaintiff alleges claims arising under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the Constitution of the United States.

4. The Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343 because Plaintiff alleges claims arising under the First and Fourteenth Amendments to the United States Constitution.

5. Venue is proper in this Court under 28 U.S.C. § 1391(b) because the claims arose in this judicial district.

*Statement Of Claim*

5. On or about December 8, 1990, Plaintiff placed upon her own property located within the City of Ladue a sign stating "SAY NO TO WAR IN THE PERSIAN GULF/CALL CONGRESS NOW" for the purpose of expressing her belief in opposition to war in the Persian Gulf.

6. The sign was taken from Plaintiff's property on December 8, the same day she put it up.

7. On or about December 10, 1990, Plaintiff replaced the sign with an identical sign. The next day, the sign was knocked down, apparently by vandals.

8. Plaintiff called the Police Department for the City of Ladue to request assistance in protecting her sign from vandals. Plaintiff was informed at that time that posting such signs was against a Ladue ordinance.

9. Plaintiff then telephoned Ladue City Hall in order to obtain further information regarding the ordinance. She was advised that such signs were not permitted in Ladue.

10. On or about December 12, 1990, Plaintiff went to Ladue City Hall to obtain a copy of the ordinance. She was given a copy of the ordinance (attached hereto as

Exhibit A). Plaintiff read the ordinance and believed she could obtain a permit to display her sign from E. C. Hankins, the Ladue City Clerk. However, Plaintiff was further advised that Mr. Hankins was unavailable but would be available on December 13.

11. On December 13, Plaintiff returned to Ladue City Hall and was again advised that Defendant Hankins was not in. She was then referred to Chief Calvin Dierberg, the Ladue Chief of Police. Chief Dierberg asked Plaintiff what her sign said, and Plaintiff told him. Chief Dierberg then advised Plaintiff that he could not issue her a permit to display the sign, but she could attend the next City Council meeting to petition the Council for permission to display the sign.

12. On December 17, 1990, Plaintiff appeared before the City Council of the City of Ladue, at a regularly scheduled council meeting, and requested the issuance of a permit to place the aforementioned sign on her property.

13. A vote was held by the City Council denying Plaintiff a permit to place such sign upon her property,

14. Defendants' ordinance violates the rights of free speech protected by the First Amendment of the Constitution of the United States and should be invalidated.

15. The actions of the City seek to restrain Plaintiff's freedom of speech, and the continued denial of a permit to place the sign upon her property will cause Plaintiff irreparable harm and will result in damages to Plaintiff that are difficult, if not impossible, to ascertain.

16. Unless Defendants are enjoined from removing the aforementioned sign from Plaintiff's property, or alternatively enjoined from seeking to enforce the unconstitutional ordinance, constitutional rights of Plaintiff will be impermissibly abridged.

WHEREFORE, Plaintiff demands that the Court enter the following orders:

1. Preliminary and permanent injunctive relief restraining and prohibiting Defendants from directly or indirectly, alone or in concert with others, enforcing the provisions of the Ladue City Ordinance, attached hereto as Exhibit A, with regard to the aforementioned sign.

2. Preliminary and permanent injunctive relief restraining and prohibiting Defendants, or their representatives, from removing the aforementioned sign from the property of Plaintiff.

3. Attorneys' fees and costs.

4. Whatever additional relief the Court may deem appropriate under the circumstances.

GREEN, HOFFMANN & DANKENBRING

By: /s/ Martin M. Green  
 MARTIN M. GREEN  
 MITCHELL A. MARGO  
 T. TODD IVESON  
 7733 Forsyth Boulevard, Suite 800  
 St. Louis, MO 63105  
 314-862-6800  
 Attorneys for Plaintiff

[Verification Omitted in Printing]

REPEALED JANUARY 21, 1991

## Chapter 35

### SIGNS

Art. I. In General, §§ 35-1—35-27

Art. II. Permit, §§ 35-28—35-35

#### Article I. In General

##### Sec. 35-1. Definitions.

For the purpose of this chapter, the following terms and words shall have the meanings respectively ascribed to them:

*Area of signs.* The entire area within a single continuous perimeter enclosing the extreme limits of such sign, except "wall signs". Such perimeter shall not include any border or structural elements lying outside and not forming an integral part of the display. The area of a wall sign shall be the height of the tallest letter or display item multiplied by the length of the sign.

*Office building.* A building in which any of the occupants use the space occupied therein primarily for purposes of offices.

*Sign.* A name, word, letter, writing, identification, description, display model, special lighting arrangement, or illustration which is placed upon, affixed to, painted or represented upon a building or structure, or any part thereof, or in any manner upon a parcel of land or lot, and which publicizes an object, product, place, activity, person, institution, organization or place of business. The word "sign" shall also include "banners", "pennants", "insignia", "commercial signs", "bulletin boards", "ground signs", "poster billboards", and "electric signs", wherever placed.

*Wall signs.* Any sign painted on or constructed into and as a part of the wall or exterior of a structure and not extending out from or above the wall or exterior of such structure, but forming an integral part of the surface of such wall or exterior thereof provided that such sign may extend above the wall where there is a wall or roof structure behind all of such extension.

*Window signs.* Any sign attached to the outside or inside of a window, or placed immediately inside of a window for public display purposes to persons on the outside of such building. (Ord. No. 812, § 2, 1-21-63; Ord. No. 929, § 1, 10-16-67; Ord. No. 1387, § 1, 2-10-86)

##### Sec. 35-2. Exemptions from chapter provisions.

The following signs are exempted from the provisions of this chapter:

- (a) All municipal signs.
- (b) Subdivision identification signs of a permanent character and road signs for danger, direction or identification.
- (c) Signs not exceeding one (1) square foot of display surface on a residence building stating only the name and profession of an occupant.
- (d) Health inspection signs.
- (e) Real estate signs authorized by section 35-12. (Ord. No. 812, § 16, 1-21-63)

##### Sec. 35-3. Conformance to chapter provisions.

No sign shall be erected, constructed, painted, placed, enlarged, changed or relocated except in conformity with the provisions of this chapter nor until a permit has been issued; provided that the repainting of display matter shall not be deemed a change. (Ord. No. 812, § 14, 1-21-63)



**Sec. 35-4. Removal of nonconforming signs.**

Any sign which is not constructed, erected or maintained in accordance with the provisions of this chapter may be removed by the city and the cost thereof charged to the owner of, or person maintaining, such sign. (Ord. No. 812, § 15, 1-21-63)

**Sec. 35-5. Variation of chapter provisions.**

The council may grant a permit required by this chapter and permit a variation in the strict application of the provisions and requirements of this chapter where there are practical difficulties or unnecessary hardships, or where the public interest will be best served by permitting such variation. (Ord. No. 812, § 18, 1-21-63)

**Sec. 35-6. Signs restricted within city.**

There shall be no commercial billboards in the city; and no person shall construct, erect, place, paint, display or maintain any sign for display or advertising by means of ground sign boards, free standing signs, roof sign boards, wall signs or bulletins, window signs, illuminated signs, or any other signs, whether or not of the classes herein listed, within the city, except as herein expressly authorized.

The signs hereinafter authorized shall not include, and it shall be unlawful to install, construct, place, display or continue to maintain any sign which is moving, flashing or animated. (Ord. No. 812, § 3, 1-21-63)

**Sec. 35-7. Signs at filling stations.**

In lieu of the signs authorized by other sections of this chapter, gasoline filling stations may erect one banjo type ground sign having an area of not more than twenty-five (25) square feet on each side (except where located on Lindbergh Boulevard, in which event such area shall not exceed sixty (60) square feet on each side) placed no

closer to a street than the nearest edge of the road right-of-way, and having a ground clearance not less than twelve (12) feet at the bottom edge thereof, nor more than twenty-two (22) feet at the top edge thereof.

In addition, such filling stations may erect two (2) free standing signs of not more than twelve (12) square feet each, whose height aboveground at the top edge thereof shall not exceed four (4) feet; and three (3) building or window signs each having maximum dimensions of not more than two (2) square feet in height, with a length not to exceed six (6) feet, and having a combined total area for the three (3) signs of not more than sixty (60) square feet; provided that where such filling station is located on a corner lot it may have four (4) such building or window signs. (Ord. No. 812, § 4, 1-21-63; Ord. No. 1197, § 1, 4-17-78)

**Sec. 35-8. Signs for buildings other than filling stations.**

(a) A building, other than gasoline filling stations, which is located on less than three (3) acres of ground and is occupied by a single separately owned and operated commercial or industrial establishment may have one sign attached to such building. Such sign shall be limited to a height of not more than two (2) feet and a length not to exceed six (6) feet, and shall not extend out over either end of the building. Such sign shall not extend above the wall height of such building unless located on top of the building. In lieu of such sign, if the building is set back further than the front setback line for structures in the applicable zoning district, a free standing sign having an area of not more than fifty (50) square feet or one per cent of the ground floor area of such building, whichever is smaller, but not less than ten (10) square feet, may be erected on such building line.

(b) A building located on three (3) acres or more of ground, which is occupied as set forth on paragraph (a)

of this section, and which covers not more than forty (40) per cent of the area of the tract of ground upon which it is located, may have a sign as provided in said paragraph (a) with an area of not more than two hundred sixty (260) square feet; and where such sign is placed on a building located on Lindbergh Boulevard there is permitted in addition thereto a free standing sign having an area of not more than one hundred twenty-five (125) square feet, located anywhere within the property lines of the premises.

(c) In addition to the signs permitted by paragraphs (a) and (b) of this section, such business establishment may have one window sign with an area of two (2) square feet for each ten (10) linear feet of window frontage on the street where displayed, but may have two (2) such signs in any event.

(d) When such building is located on a lot bordered by two (2) or more streets, or at the intersection of a street and an area used by the public for vehicular traffic, the signs permitted by paragraphs (a), (b) and (c) of this section shall be permitted on two (2) of such traveled areas. (Ord. No. 812, § 6, 1-21-63; Ord. No. 1197, § 1, 4-17-78)

#### **Sec. 35-9. Signs for office buildings.**

A building which is occupied to any extent as an office building or to any extent as an arcade building with business establishments not fronting on a public street may have the following signs, to wit:

- (a) Each commercial and industrial establishment occupying any portion of the ground floor of such building and facing a public street may have the signs permitted by section 35-10.
- (b) The occupants using a portion of the building for offices and those occupants having business estab-

lishments not fronting on a public street may have one sign for all such occupants giving only the name and address of the building, and the name and one business of each of such occupants. The area of such sign shall not exceed sixteen (16) square feet, and it shall be located on the wall of such building adjacent to the entrance thereto, or it may be a ground sign similarly limited as to area and content, located adjacent to or near the front property line of the premises. (Ord. No. 812, § 5, 1-21-63; Ord. No. 929, § 1, 10-16-67)

#### **Sec. 35-10. Signs for buildings other than office or arcade.**

(a) A building other than an office or arcade building which is occupied by more than one industrial or commercial establishment, may have one sign attached to such building for each such occupant facing a public street. All such signs shall be limited to a height of not more than two (2) feet and a length not to exceed six (6) feet and shall not extend above the wall height of the building except when located on top of the building; and no sign shall extend out over either end of the building.

(b) In addition to the sign permitted by paragraph (a) of this section each of said separate business establishments may have the window signs that are authorized by paragraph (c) of section 35-8.

(c) When the portion of the building occupied by such establishment is located on a corner of two (2) intersecting streets, or at the intersection of a street and an area used by the public for vehicular traffic, the signs permitted by paragraphs (a) and (b) of this section shall be permitted on each of such intersecting traveled areas. (Ord. No. 812, § 7, 1-21-63; Ord. No. 1197, § 1, 4-17-78)



**Sec. 35-11. Signs for churches, schools.**

Any church or school located in the city shall be permitted to erect one wall bulletin or one ground sign, neither of which shall be more than sixteen (16) square feet in area, when located on the premises occupied by such church or school. Such sign shall be limited to announcements relating to the name of such church or school, its services, activities or other functions, and shall be located so that it does not interfere with a motor vehicle driver's view of the public roads or of the driveway leading into or out of such church premises.

In addition, a church or school may erect a temporary sign during a continuous period of not more than sixty (60) days, subject to the same limitations as to area and announcements. (Ord. No. 812, § 8, 1-21-63)

**Sec. 35-12. For sale signs.**

It shall be permissible for the owner or authorized agent of premises to erect a ground sign advertising the sale or rental of the premises upon which it is maintained; but such sign shall not be attached to any tree, fence or utility pole, shall contain no other advertising matter and shall be not more than two (2) feet in height by three (3) feet in length.

The term "premises" as used in this section means any recorded lot or tract of land of not less than the minimum area required for building purposes in the zoning district in which such lot or tract is located under the provisions of the city's zoning ordinance or any lot excepted for legal reason from the minimum area restriction provided by such ordinance. Where an undivided tract of land is large enough to be subdivided into two (2) or more lots under the provisions of the zoning ordinance, such sign may be placed on each such lot into which it may be legally possible to subdivide such tract of land. (Ord. No. 812, § 9, 1-21-63)

**Sec. 35-13. Illuminated signs.**

No one shall install or maintain more than one illuminated sign among the signs permitted by this chapter, and no sign shall be illuminated otherwise than by electricity. All illuminated signs shall be constructed entirely of metal or other incombustible material, except the insulation thereof, including the uprights, supports and braces for the same, and if on a building shall be properly and firmly attached to the building and constructed so as not to be or become dangerous. The illumination provided shall be limited to the minimum amount necessary to allow the text of the sign to be read. Such sign shall be illuminated only during the business hours of the sign user. (Ord. No. 812, § 10, 1-21-63; Ord. No. 1291, § 1, 12-16-81)

**Sec. 35-14. Roof signs.**

Every roof sign shall be constructed entirely of steel construction, including the upright supports and braces of the same, and must be so constructed as to withstand a wind pressure of not less than thirty (30) pounds to the square foot of area subject to such pressure. When a roof sign is erected on a building which is not constructed entirely of fireproof materials, the bearing plates of said sign shall bear directly upon the masonry, walls, or upon the steel girders which are supported on the masonry walls and intermediate columns of such building. All roof signs shall be thoroughly secured to the building upon which they are installed by iron or metal anchors, bolts, supports, chains, stranded cables, steel rods, or braces. (Ord. No. 812, § 11, 1-21-63)

**Sec. 35-15. Free standing, ground signs.**

No free standing or ground sign (other than banjo signs of gasoline filling stations) shall be at any point more than fifteen (15) feet above the ground level, and



every such sign shall have an open space of not less than two (2) feet between the lower edge of such sign and the ground level. All ground signs shall be designated and constructed so as to be safe from falling and to withstand wind pressures of not less than thirty (30) pounds to the square foot of area subject to such pressure. (Ord. No. 812, § 12, 1-21-63)

**Sec. 35-16. Prevention of corrosion.**

All signs which are not galvanized or constructed of approved corrosion-resistive, noncombustible materials shall be painted whenever necessary to prevent corrosion. (Ord. No. 812, § 14, 1-21-63)

**Sec. 35-17. Maintenance of premises near sign.**

It shall be the duty and responsibility of the owner of, or person maintaining, a sign to maintain the immediate premises occupied by the sign in a clean, sanitary and healthful condition. (Ord. No. 812, § 14, 1-21-63)

**Sec. 35-18. Notice to remove unsafe sign.**

When any sign becomes insecure, in danger of falling, or otherwise unsafe, or if any sign exists or is installed or maintained in violation of the provisions of this chapter with respect to construction or safety, the owner, person or firm maintaining such sign shall correct the deficiencies or violation or remove the sign within ten (10) days after receiving notice from the city clerk; provided, however, that if such sign constitutes an immediate danger to the public health, safety or welfare, the building commissioner shall order immediate correction or removal of such sign. (Ord. No. 812, § 14, 1-21-63)

**Secs. 35-19—35-27. Reserved.**

**ARTICLE II. PERMIT**

**Sec. 35-28. Required.**

No sign shall be erected, constructed, painted or placed upon any building or premises within the city until a permit therefor has been issued by the city clerk. (Ord. No. 812, § 13, 1-21-63)

**Sec. 35-29. Application.**

No sign permit shall be issued until after an application therefor has been filed with the city clerk accompanied by duplicate scale or dimensional drawings showing the plans and specifications, dimensions, the material of which said sign is to be constructed, the details of construction thereof, including loads, stresses, and anchorage, the estimated cost thereof, and in the case of ground signs the proposed location with reference to street lines and the walls of adjacent buildings, if any. When a proposed sign is to be attached to a building or other independent structure, the drawings shall show the position of the sign on the supporting structure, the method of attachment to such structure and the character of the structural member to which such attachment is made.

All applications for permits to erect signs shall be filed by the owner of the premises, or shall be accompanied by written consent of such owner, the lessee, or agent of the property upon which said sign is to be erected. (Ord. No. 812, § 13, 1-21-63)

**Sec. 35-30. Permit fee.**

A permit fee of ten dollars (\$10.00) shall be paid to the city clerk in connection with each application under this article for a sign of fifty (50) square feet or less, and twenty-five dollars (\$25.00) for a sign of more than fifty (50) square feet, except those relating to an authorized church sign or a school sign on public school property. (Ord. No. 812, § 13, 1-21-63)

**Sec. 35-31. Issuance.**

The city clerk shall not issue any permit under the provisions of this article until he has determined that the provisions of this chapter have been complied with and the building commissioner has approved the plans and specifications as complying herewith. (Ord. No. 812, § 13, 1-21-63)

**Sec. 35-32. Appeal upon denial.**

Anyone applying for a permit for a sign under the provisions of this article whose application has been denied, may appeal to the city council for the issuance of such permit. (Ord. No. 812, § 18, 1-21-63)

**Sec. 35-33. Additional regulations.**

The city clerk may prescribe suitable regulations consistent with the provisions of this chapter concerning the form and contents of all applications for the permits herein required. (Ord. No. 812, § 13, 1-21-63)

**Sec. 35-34. Inspection of signs.**

All signs requiring permits shall be inspected annually by the building commissioner or someone appointed by him for such purpose. The owner of each sign requiring inspection shall pay the city an inspection fee of ten dollars (\$10.00) per sign of fifty (50) square feet or less, and fifteen dollars (\$15.00) per sign of more than fifty (50) square feet; such inspection and fee payment to be made prior to March first of each year. Signs on which inspection fees are not paid within thirty (30) days after due date may be removed by the city and the cost thereof charged to the owner or person or firm maintaining such sign. (Ord. No. 812, § 15, 1-21-63; Ord. No. 1311, § 1, 12-6-82)

**Sec. 35-35. Application to existing signs.**

The provisions of this chapter shall apply to the continuance, alteration, reconstruction, construction and maintenance of all signs within the city. In the event any sign now exists within the city which is in violation of the provisions of this chapter, it shall be the duty of the owner and also of the occupant, tenant or lessee of such premises to remove such violation so as to make all such signs conform to and comply with the requirements, provisions and limitations of this chapter within thirty (30) days after the effective date of this Code; provided however that the size limitations provided in this chapter shall not apply to presently existing signs attached to the exterior of a building. (Ord. No. 812, § 17, 1-21-63)

## EXCERPTS FROM DEPOSITIONS

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

Civil Cause No. 90-2396-C-7

MARGARET P. GILLES

v.

CITY OF LADUE, EDITH J. SPINK, MAYOR OF THE CITY  
OF LADUE; THOMAS R. REMINGTON, GEORGE L. HENS-  
LEY, GALE S. [sic] JOHNSTON, JR., ROBERT A. WOOD,  
ROBERT D. MUDD, GEORGE FONYO, AS MEMBERS OF  
THE CITY COUNCIL OF CITY OF LADUE

## DEPOSITION OF MARGARET P. GILLES

[4] Q Would you state your full name for the record,  
please?

A Margaret Piffer Gilles.

Q Ms. Gilles, where do you reside?

A 40 Willow Hill.

\* \* \* \*

[7] Q So we can agree that it's principally a residential  
suburban community?

A Yes.

Q Why did you choose the City of Ladue when you  
came back to this area?A I looked at several houses. I liked the house. I  
liked the neighborhood. I loved the trees. It was very  
convenient. Very easy to get around from, I liked it.

\* \* \* \*

[10] Q I'd like to ask you first of all, how many resi-  
dents are there in Willow Hill Subdivision?

A How many?

[11] Q How many homes, let me ask you that first.

A About 50.

Q Okay.

A I'm not sure, I mean I'm just, I'm thinking of  
numbers, I really, I never counted them.

Q What is the name of the lane that you live on?

A Willow Hill.

Q Willow Hill?

A Willow Hill Road.

Q All right. Is that a thoroughfare, would you call  
that a thoroughfare, heavily traveled thoroughfare?

A No.

Q Is it a residential street?

A Yes.

Q Can you tell me, does it inter-connect with any  
other streets, with any major streets?

A Well, with Ladue.

Q Any other major streets?

A No.

Q Any others?

A No.

Q Would it be a fair statement to say then that peo-  
ple using your street are using it for the purpose of get-  
ting into or leaving the subdivision?

A Yes.

[12] Q Not for the purpose of going through some-  
place else?

A Yes.

\* \* \* \*

[13] MR. MARGO: Would you explain that?

MR. SUMMERVILLE:

\* \* \* \*



Q All right. When did you form the decision in your mind that you would like to put the yard sign which is at issue, in your yard?

A Well, when I heard about the yard signs as part of the effort that St. Louis is forming for peace in the Persian Gulf, to really bring pressure upon the elective representatives in Washington to do something with this horrible situation, to stop the world from going to war.

Q Okay. Can you give me a calendar date or—

A —I don't remember exactly when it was, sometime in late November when I first heard there were going to be signs. I got mine in December.

Q Early December or middle December?

A Yes, around the 7th or 8th, the 7th of December, something like that, I don't remember the exact date, but I know we put it up on the 8th.

Q Okay. Who did you expect your audience to be for the message that you wanted to put on your sign?

A Whoever was driving through.

Q Can we agree that that would principally be the [14] residents of Willow Hills Subdivision and their social guests?

A And delivery men and people like that.

Q Would it be principally the residents of Willow Hill incidentally, and workmen, and tradesmen, and people like that?

A I suppose so.

Q Well, wouldn't you agree that the principal traffic in and out of there would be the people that live there?

A Yes.

Q Is that right?

A Right.

Q Why did you choose that method of expression?

A Because it's part of a city-wide effort and I wanted to be part of that.

Q Did you give any consideration at all to the alternative methods of communicating that message?

A I had written a letter to the Post which was not published. I had written to all of the elected officials and the Secretary of State Baker. I am so concerned about this issue that I was willing to do anything to get the word out.

Q Would you have been willing to put the same information on a piece of paper and xerox it and place a [15] copy on each of your neighbor's mailboxes?

A What I believe I said was I wanted to be part of the city-wide effort, that this is a campaign to raise public awareness and I chose to be part of that.

Q I'm asking about your answer when you said you would be willing to do anything.

A Yes.

Q Would you have been willing to put the same legend on a piece of paper and xerox it and distribute it in the neighborhood in the mailboxes?

A In addition to the sign?

Q I asked—

A —sure.

Q I'm asking why did you choose not to do that?

A Because this is a campaign which we started. We also are working on putting candles in the windows as a prayer for peace and we wanted to make a connection between the candle in the window, particularly this time of the year, as people decorate, put them up as decorations, and the importance for informing Congress about our effort. The importance of that candle is for peace, not just Christmas decoration, we wanted to tie the two together.

Q Did you give any consideration to telephoning your neighbors?

A No I didn't.

[16] Q Okay. And why not?

A I just didn't think about it.

Q And was that possibility available to you?

A Well, sure.

Q Was it a possibility also to knock on their doors and speak with them personally?

A Yes.

Q Okay. Did you consider that, strike that.

Do you believe that that method which you chose, that is to place a card in your front yard was more effective for any reason, or would be more effective for any reason than broadcasting the message you wanted to broadcast to the audience you wanted to reach and all the alternative methods, namely the telephone, direct contract, doing xerox messages or writing personal letters.

MR. MARGO: Can I ask a question, I'm not sure I understand your question, did they consider that?

MR. SUMMERVILLE:

Q Well—

MR. MARGO: —or did she consider this at the time?

MR. SUMMERVILLE:

Q Yes, did she consider that at the time she was doing this?

[17] A Yes because I could reach more people with the sign.

Q Why did you believe that?

A Because other people do drive in, guests, workmen, and they all see the sign.

\* \* \* \*

Q How much did you sign cost?

A Four Dollars (\$4.00).

\* \* \* \*

[42] Q Ms. Gilleo, there has been commentary in the press that you had another sign on another subject in your yard before the one that is in controversy; is that correct?

A Yes I did.

Q And what was the subject of that sign?

A Natural Streams, Save our Streams.

Q During what period of time did you have that sign up?

A A couple weeks before the November 6th election.

\* \* \* \*

[43] Q Okay. That's fine. Do you know of any instances where the Ladue Police have made any decision to waive the enforcement of the sign Ordinance based upon the nature of the message on the sign?

A No.

Q Do you personally know of any instances where the Ladue City Council has granted a waiver of the sign Ordinance to a resident for a yard sign?

A No.

\* \* \* \*

#### DEPOSITION OF THOMAS R. REMINGTON

[6] THOMAS R. REMINGTON,

of lawful age, having been produced, sworn and examined on behalf of the Plaintiff, deposes and says, as follows:

#### DIRECT EXAMINATION

#### QUESTIONS BY MR. GREEN:

Q State your name, please.

A Thomas R. Remington.

Q What is your occupation, Mr. Remington?

A I'm an attorney.

Q Are you a partner in Armstrong-Teasdale?

A I am.

Q Are you also a councilman for the City of Ladue?

A Yes, sir.

Q How long have you been a councilman there?

A Fifteen-plus years.

Q Does the Ladue City Council have a chairman?

A It has a president.

Q Or a president, I'm sorry.

A Yes, sir.

Q And are you the president?

A I am the president.

Q How long have you been president of the council approximately?

A Fifteen-and-a-half years.

\* \* \* \*

[8] Q Will you tell me what took place when you [9] arrived at the council meeting as it relates to the application, not to the other matters before the council?

A When I arrived at approximately 5:00 P.M. I believe the council was discussing another subject.

At the end of that subject, the mayor, who presides over the meeting, stated Mr. Remington is here now, we go on with the Gilleo matter. That's all I knew.

Then Mrs. Gilleo stood and made her application.

Q Okay. And what did she say?

A She identified herself as a resident of Willow Hill. She stated that she wished to have the council act on a variance for her sign. She read the variance provisions, I believe, that talked in terms of hardship and other circumstances.

She told the council of the theft of her first sign, the vandalizing of her second sign.

At some point, and I'm not sure whether this is all in order, she exhibited the sign to the council for our information. She said something to the effect that while she does not believe that signs should be a way of life in Ladue that she left very strongly about this issue and hoped the council would grant her Petition for a variance.

She gave us some information on her background. [10] I heard it as saying that she was a lawyer, but I may have heard wrong. I can't think of anything else she said herself.

Q Did you respond?

A Not immediately. The procedure is to let the Petitioner make her case, following which the mayor closes the public meeting.

So there was no response, which I recall, directly at the time of her presentation because others followed her.

Q I see. And then the vote came later; would that be correct?

A Yes, the discussion comes later and the vote comes later. We let the petitioners present their arguments before the council intervenes.

Occasionally there'll be a question from the council, but I don't recall any during the course of her presentation.

Q All right. Following her presentation and any other public comments made by residents of Ladue, did the council go into closed session or in any session?

A It did not go into closed session, no, sir.

Following the presentation by Ms. Gilleo and others, then there was dialogue between the council and those who had made the presentation as to their feelings [11] about the nature of this sign, what conflicts or what kinds of causes they would advocate be the subject of variances for the city.

Q Okay. Can you tell me, was that discussion amongst members of the council open to the public? In other words, was it done in—

A Oh, yes, sir.

Q —public?

A Yes, sir, absolutely.

Q And would you tell me to the best of your memory, and I realize you may not recall each detail.

A Uh-huh.

Q But to the best of your memory, could you tell me specifically what each member of the council said? And if you can't recall it word for word, just in substance.

A The only distinct recollection I have of those who spoke other than myself was Mr. Robert Mudd, Councilman from the Third District, stating that he felt that Ladue was the type of community that ensures its residents both the privacy, the freedom from having to observe signs, I think the papers quoted him as "We don't want to look like junk city."



He also, I think, questioned Mrs. Gilleo on whether she would advocate abortion versus nonabortion, [12] would these be the kinds. I don't recall her response to that.

Q I see. Did anyone else on the council, other than the one remark, did anyone make any other remarks, to the best of your knowledge?

A I recall no others other than the comments I made in presenting the motion. There may have been others. I just can't recall.

Q Based on, as I understand it, what Councilman Mudd said, the discussion seemed to center around the controversial nature of the sign. I don't mean to summarize or tell you what you said, but as I listened to you, the only comments I heard were comments concerning the controversial nature of the sign, he referred to the abortion issue and that.

Was that your recollection, too?

A I think not only controversial, but also multiplicity of signs should there be variations granted to the sign ordinance for a matter like this.

There was certainly some attention to give to—in Mudd's comments, I believe, to the aesthetics of multiple signs.

Q Do you recall what he said about the aesthetics?

A I think the newspapers recorded it. Something [13] about I don't want to drive home and be driving through junk city, something of that sort. Those words ring a bell.

Q Okay. Now, at the time that Mrs. Gilleo filed her application with the council, were there any other applications on file for private signs?

A I do not believe so.

Q So Councilman Mudd, I assume, was talking about the possibility in the future that if you allow this one sign, which is controversial, other people taking different

points of view might apply for more signs and that could result in what he called junk city?

Am I stating it correct?

A I think you're stating it fairly.

Q Do you know whether or not Councilman Mudd or anyone else on the council had made any studies or checked with other municipalities or done anything to determine if his concern was valid?

A I know of no such examination.

Q When he manifested his concern over the possibility that Ladue could become, or at least that section of Ladue could become junk city, did the other councilmen nod in approval or indicate any assent?

A I don't remember any such accreditation by others during the course of that dialogue.

[14] Q Were you, as president of the council, concerned that that neighborhood could become junk city?

In other words, was that a serious concern of yours personally as president of the council?

A Yes.

Q Okay. And what was that concern based upon?

A The concern was based upon my knowledge of the reasons why a number of people in those neighborhoods including Willow Hill, mine, others I've lived in prior, Briarcliff, Maryhill, their feelings about why they come to Ladue.

They come to obtain the peace and the privacy that Ladue's character, makeup, the way it has grown, the way it has developed with our zoning ordinances and other ordinances to provide an area of largely private streets where you're somewhat insulated from the controversies of the street corner.

Q All right. While I don't mean to bicker with you—

A Yes.

Q —over your statement or question your belief in what you've just said, what I want to ask is this: Wouldn't it seem to you that, from what you just said concerning

the interest of Ladue residents, generally, from your living there for many years and your experience [15] and so forth, desiring the peace and privacy of their neighborhoods and to be sign free, wouldn't that indicate to you that there probably would not result a junk city, based upon the attitudes of the people that you know and have spoken to?

In other words, what I'm hearing is that they are against signs, and thus the ordinance, and yet you and Councilman Mudd seem to be concerned about the proliferation of signs, which to me is the opposite of what the ordinance says.

A Uh-huh.

Q And I'm trying to reconcile those points of view in this question.

A I think that if we did not have the ordinance, and a controversial sign comes up which is inviting a lot of attention, that you would see other signs go up with contrary views expressed.

This is a far cry from the issues of war and peace or abortion or nonabortion, but I can recall when we were considering closing one end of Litzinger Road. I think we had more than four thousand pieces of mail on that subject, bitterly divided. I think signs would have gone up on that had we not had a sign ordinance, and I think that would have led to the kinds of things that we hope to prevent, invasion of the privacy people, [16] forced audiences, having to observe this on stretches of road, diversion of motorists' attention, are the kinds of things that I feel are the justification for the sign ordinance as it is.

\* \* \* \*

[21] Q Now, pardon the superlatives, but you are a very highly regarded lawyer with many years experience, and I know that following this meeting you must have

given your thoughts to the First Amendment issues that have been raised; would that be correct?

A That is correct.

Q Okay. Have you reached any conclusion based on you reach or experience, your meetings with council for the city and so forth, as to whether or not you see a potential problem here with respect to infringement on our client's First Amendment rights?

MR. SUMMERVILLE: Just object to the question for the Record, to the extent that it asks for an expert opinion. Since the Judge will be the expert in the law, to the extent that it seeks Mr. Remington's thoughts as a councilman, I have no objection, and as a lawyer, I do object to the question to the extent that it asks for an expert opinion.

Subject to that, you can answer.

A As I indicated to the council, I have a very strong feeling about the sanctity of First Amendment rights.

[22] I also feel they're not absolute. Fire in the theatre is a cliché, as you say.

Q (By Mr. Green) Sure.

A But it is probably at the far end of the qualifications.

My own feelings, with really inadequate research, with no time to research, is that there are three areas involved in our action statute and the aura of life in Ladue of modifying importance on that right. The right of privacy is one of people's reasons for living in Ladue or living in the quiet subdivision area, do not want to be captive audiences for neighborly disputes whether they're on a national scale, such as the Persian Gulf, or whether they're on the closing of Litzinger Road.

Secondly, I think given the types of streets and neighborhoods we have in Ladue where seventy-five percent of the roadways are in small subdivisions, narrow roads, many of them blocked by barrier horses, none of them with sidewalks, all of them children using the streets as the method of going to and from school, of playing neighborhood games, there is a legitimate safety issue concerned

with the placement of signs, which by their very nature are designed to distract attention, to draw attention. So that I think there is a second arena [23] where the First Amendment rights may have a qualification.

The third, and really least important, does not to me measure up to, in and of itself, a qualification of that right or the aesthetics of the matter. I don't think we have to explain what we mean by aesthetics. I think it's clear in other communities when you drive through the, quote, eyesore that these kinds of signs can provide.

Q I see. Do you believe that one sign affects the aesthetics of the entire city, or are you talking about a multitude of signs, and if indeed there would be a multitude of signs?

A Well, of course, a multitude is far, on the point of view of aesthetics, would be much more displeasing than one.

Q Okay. So you're really saying, and I don't mean to put words in your mouth, that if Mr. Gilleo's application was approved and she was permitted to put up the one sign that she wanted to put up, that Ladue would become junk city?

A If that were the end of it, that's a fair statement. I don't believe that would be the end of it.

Q As I understood you, again you'll check me if I misstate it, that you, as I understand it, that the [24] aesthetic issue by itself, putting aside the safety issues and the other issues would not outweigh an individual's First Amendment rights; would it?

A That's correct.

\* \* \* \*

#### DEPOSITION OF EDITH J. SPINK

[5] Q State your name please?

A Edith J. Spinks [sic].

Q Mrs. Spinks [sic], what is your occupation?

A I am Mayor of the City of Ladue.

Q Is that a full-time job?

A Well, I give full-time to it but it might not take that much time.

Q How long have you been the Mayor of Ladue?

A For 15 years.

Q How long—

A —since 1975.

Q How long have you been a resident of the City of Ladue?

A Since 1967.

Q Prior to the time that you were Mayor, did you hold any other position with the City of Ladue?

A Yes, let's see, I was the Councilwoman for the 3rd Ward which is the area south of Clayton Road. In the west part, from 1970 to 1975.

\* \* \* \*

[14] Q Okay. You were here during Mr. Remington's deposition?

[15] A Yes.

Q Is that correct?

A Yes.

Q And I believe he testified, and you tell me if you don't agree, he testified that in terms of aesthetics he did not believe that aesthetics was a sufficient reason to overcome someone's First Amendment Right, do you agree that that's what he said?

A Yes.

Q You agree with him?

A I think aesthetics could be added into other violations such as privacy, safety and it's what you would consider to be in the public interest, welfare, public interest.

Q By aesthetic itself, it would not rise to that level, that is necessary to overcome a First Amendment Right?

A No.

Q You agree?

A I'm agreeing, yes, I'm sorry.

\* \* \* \*



[19] A I still say this is speculative because I didn't. I didn't consider this because I did not vote on it, all I did was conduct the meeting and the Council voted on it.

Q Let me take a step back and ask you if you considered this sign controversial?

A If I did or I do?

Q Do you?

A I do consider it a controversial sign.

Q Would that go into your factors in deciding whether to issue a variation if that occasion arose?

MR. SUMMERVILLE: I'll object.

MR. MARGO: Q And we'll let your objection run.

MR. SUMMERVILLE: Well, let my objection as to speculation run, subject to that you may answer.

A Yes it would.

MR. MARGO: Q Would the fact that the sign is controversial going to your factors in deciding to issue a variation under the element of necessary, unnecessary hardships, that the Ordinance contains?

MR. SUMMERVILLE: Same objection, go ahead.

[20] A Well, I just can't, I believe in freedom of speech and I have a very difficult time separating the unnecessary hardships or the practical difficulties when it comes to safety and privacy. It's all entered into as to whether or not I felt this would, people would have to be reading the sign and would perhaps have an accident because of their reading the sign. They may run into another car or hit a child. Run into a mailbox.

MR. MARGO: Q How do you, if you do, how do you distinguish between this sign on the one hand for instance, and a for-sale sign which we have all agreed the City allows?

A Well, I think that for-sale signs are signs that people are accustomed to seeing, but I also feel that a for-sale sign, usually for-sale is just two words and unless you're really interested in buying a house, it doesn't make any difference as to who the real estate agent is and all the

other information on it, what it is, you're only interested in, that it is for-sale.

Q So for-sale is two words?

A Two words.

Q Okay. If this sign had said Peace Now, would that be the kind of sign that you would consider to issue a variance to, because it would not be that much of a distraction?

[21] MR. SUMMERVILLE: I'll object to the form of the question, it calls for a hypothetical, subject to that you may answer.

A That can be controversial because you don't know what peace they are referring to.

MR. MARGO: Q So peace now because it's controversial would also be controversial?

A I don't know what they're talking about, what peace are they talking about?

Q Okay.

A People could have, they could be talking about a peace-time war, I mean there is no war going on in Saudi Arabia, the forces are there but, you could talk about actions in South America or anyplace.

Q Again I don't want to put words in your mouth but would it be a fair statement that in your mind Peace Now would be controversial, and so you would not issue a variance?

MR. SUMMERVILLE: Same objection but go ahead and answer.

A It would all depend, I can't say. It would all depend on what people we are talking about, when you say Peace Now what is that, what is that bringing to people's minds?

[22] MR. MARGO: Q What if it said just peace?

A Peace?

Q Yes.

MR. SUMMERVILLE: I'll object to the form of the question, once again, it's a hypothetical, calls for specula-

tion, it was really calling for speculation, there's no foundation that she ever voted on a variance on a sign ordinance, it calls for pure speculation on her part. Without any more facts, I mean we would need a lot more facts to try to answer that.

MR. MARGO: Q Are you instructing her not to answer?

MR. SUMMERVILLE: No I'm not, but you're going a little bit further, you're asking a hypothetical, calling for speculation.

MR. MARGO: Q I believe she testified that as Mayor she has been given the charge of unholding the Ordinance, and I'm trying to go about finding out how she goes about that.

MR. SUMMERVILLE: I understand that.

A I would have to turn down any kind of a sign, unless Council approved it.

[23] MR. MARGO: Q Okay.

A No matter what it said.

Q But I guess I am asking for your opinion, what about the sign that just says peace, controversial or not controversial.

MR. SUMMERVILLE: Let me just make sure I understand the question, are you asking her to apply the tests that she told you about, to go through in her own mind based upon those facts whether or not she would approve it, hypothetically, if she were approving it?

MR. MARGO: Q Sure.

MR. SUMMERVILLE: If you're able to do that, I'll object to the form of the question but go ahead and answer.

A I have a difficult time until I know just that I'm talking about.

MR. MARGO: Okay.

A Let me just say this. This is the time of year, peace and good will toward men, but it all depends on whether this is a Christmas message or what.

Q Let me ask you this. Just with regard to your concern for safety?

[24] A Right.

Q That it's a distraction?

A Right.

Q Without any regard to controversy at all?

A All right.

Q Just with regard to traffic safety, would the sign that says peace be objectionable?

A It could.

Q Under what circumstances?

A If they were, you mean just one sign?

Q Sure.

A And are you considering other people having signs too or just one person?

Q Just one person.

A Well, it would all depend upon where the traffic barrier was, how wide the road was, was it on a curve or on a hill, there are a lot of safety measures that enter into it.

Q Let me ask you, would your answer be the same if it said Merry Christmas?

A Yes.

Q As you sit here today, can you think of any sign that you would vote in favor of a variance to be placed upon a residential property, where the public interest would be best served?

[25] MR. SUMMERVILLE: I'll object to the form of the question, it calls for speculation, go ahead and answer if you haven't answered, do you have answer?

A Well, free the hostages or—

—I would hate to see it all over the City of Ladue, but, to give up dope or you know, narcotics kill?

Q Without putting words in your mouth, are you saying those are signs that might be included to issue a variance for than a Stop-War-in-the-Persian-Gulf sign?

A Or one that says Right to Life or Women's Lib



or many things, it's not just Stop War in the Gulf.

Q So I'm correct then when I say you would be more likely to issue a variance for a Bring Home the Hostages sign, rather than some other, like abortion sign, or a war sign?

A Well, if it, it would require a great deal of investigation on my part, to determine what the sign looked like, whether it was going to be an eye catching one or would cause everyone to stop and look at it or whether it was just one that you could look at as you drive by and not take your mind off of your driving.

\* \* \* \*

#### DEPOSITION OF CHIEF CALVIN DIERBERG

[5] Q Would you state your name please?

A Calvin Dierberg.

Q And what is your occupation Chief?

A I'm Chief of Police for the City of Ladue.

Q How long have you been Chief of Police?

A Two years.

Q Prior to that were you with a police department?

A Yes sir.

Q In what capacity?

A Lieutenant.

Q And then you advanced when the former Chief left the department?

A Yes.

Q Is that correct?

A That's right.

Q How long have you been involved in police work?

A Since 1955.

Q And how long have you been with the City of Ladue as a police officer?

[6] A 1955.

Q Have you ever been in any other municipalities as a police officer?

A No.

\* \* \* \*

[18] Q All right. That's a fair objection, I'll try to work around it. You have mentioned two signs which were recently removed by the Police Department because they were private signs which were not authorized; is that correct?

A Yes.

Q To your knowledge with respect to those two signs, were there automobile collisions or other safety hazards, safety type accidents that occurred as a result of these two signs that were brought to your attention?

A I'm not aware of any accidents there at the time, no.

Q Okay. From the time that you became a police [19] officer in Ladue in the mid-1950's I believe up until today, as you sit here, do you know of any safety hazard created over the years by any sign that was placed on private property at all?

A Well, there was a sign, a real estate sign that had two signs actually, two signs on the corner of Conway and Warson Road with which would perhaps tend to obstruct the vision of people making a turn. Other than that I can't say.

Q All right. Did Mrs. Gilleo's sign obstruct the vision of a driver driving down the street, to your knowledge?

A Not to my knowledge?

Q And your concern I take it then and you correct me if I'm wrong, but the controversial nature of the sign would draw a driver's attention to that sign, and that driver could momentarily or for some longer period of time, could take his eyes or her eyes off the road; is that correct?

A That's true.

Q Do you have other than this safety hazard that you have just discussed in answer to my last question, do you have any other safety problems with the placement of a private controversial sign on a residence front lawn?



A Well, by her doing it it apparently generated [20] some phone calls that she did not desire, other than that, no.

Q Does Ladue have an ordinance which prohibits or makes it an offense for someone to steal property that does not belong to them?

A Yes sir.

Q You are aware of course that the State has felony and misdemeanor laws concerning stealing?

A Right.

Q Does Ladue have a peace disturbance and trespass law?

A Yes they do.

Q Do you believe those three laws that I have just mentioned are adequate to cover the situation that was presented to you with respect to Mrs. Gilleo's problem regarding the missing sign and the telephone calls?

A I'm sorry, would you rephrase that?

Q Certainly. I think we can agree that Ladue has numerous ordinances that cover offenses by people; is that correct?

A That's correct.

Q And that would include theft, it would include peace disturbance, it would include trespass. Would it also include harrassing phone calls?

A Yes.

[21] Q Okay. How many police officers do you have in the Ladue Police Department at this time?

A Thirty.

Q Is that the number of police officers in your judgment, adequate to police the City of Ladue?

A Yes.

Q Okay. And you have sufficient armanent and guns and weapons and things, police cars and other aides to adequately police the City of Ladue?

A Yes we do.

Q All right. In fact the City of Ladue Police Department is considered one of the best in the area; is it not?

A Yes.

Q Okay. Do you believe that the ordinances that I have just indicated before covering offenses in the City of Ladue, are adequate to cover the problems that arose with respect to the missing sign and the hang-up phone calls?

A Yes.

Q As I understand it you did not consider the fact that a sign was missing and the fact that a complaint was made about several telephone calls where the caller hung up, would be significant enough for you to assign any police officers to Ms. Gilleo's home at that time or anytime afterwards?

[22] A No I did not.

\* \* \* \*

[31] Q Just a couple more questions. There is a sign just east of the police station, at least I think it's east at the Bogey Club that says No Turns, are you familiar with that sign?

A Yes.

Q Is that a sign that was either approved by the Council or exempt from approval, do you happen to know that?

A I cannot tell you whether it was approved by the Council. I would say it was a directional sign and therefore probably is covered under the Ordinance.

Q As exempt?

A Yes.

Q Would your answer be the same with respect to the sign on Barnes Road as you entered the St. Louis Country Club Grounds that says No Trespassing, if you recall the sign, it's posted on a post I believe.

[32] A It's probably or possibly could be construed as directional.

Q Tell the people to keep off the property?

A Yes, under Paragraph B Subdivision signs of a permanent character and road signs for danger, correction or identification.

Q And then you would construe that sign again I'm really—

A —yes I would construe that as, that way.

Q That way, is that correct?

A As permissible.

Q Okay. Permissible because it's exempt from getting a permit or because the permit was received?

A I would say the sign was exempt under the exempt section.

\* \* \* \*

#### DEPOSITION OF SALLY H. GULICK

[5] Q Would you state your name, please?

A Sally Herman Gulick.

Q Ms. Gulick, I understand that you are a resident of the Willow Hill Subdivision.

A I am.

Q Living at No. 30.

A Yes.

Q Let me just tell you that you need to say yes or no in order for the reporter to take down your response. I also understand that you executed an Affidavit a few days ago, three page Affidavit which proports to be signed by you. Did you execute that Affidavit?

A What do you mean by execute?

Q Did you sign it?

A Yes.

Q Okay. Does the Affidavit contain your words or were these the words someone else wrote down and you looked at?

A They were someone else's words that I—

[6] Q —whose words were they?

A Mr. Remington and his assistant.

\* \* \* \*

[10] Q Well I'm trying to determine what is your problem with signs in the neighborhood, can you tell me?

A I personally feel that I do not care to come home and see signs on people's yards with their opinions expressed on them.

Q Okay. Let me ask you first about the signs and then the opinions. With regard to just a sign, let's say it was blank, would that be a problem for you?

A Yes.

Q And am I correct that that problem is it's aesthetically unpleasing?

A I think it's a distraction.

Q Okay.

A I live in a small narrow street and there are children playing in the street and if you put up a distraction it's going to detract from their watching the road.

\* \* \* \*

[11] Q Other than a distraction, are there any other reasons that you are in favor of not having signs?

A Yes, I guess what you mean is do I object to it in terms of beauty of the neighborhood—

Q —okay—

A —I would prefer that there was not a sign there.

Q Okay. So, can we agree that it's aesthetics it's not pleasing to you to see it?

[12] A Yes.

Q Okay. Any other reasons?

A No.

Q Let me ask you if you've ever seen residential for-sale signs in your neighborhood?

A Yes I have.

Q Are those a distraction?

A I know it's a distraction, yes, I, I, yes, they are a distraction but they're not one that's going to cause a motorist to slow down and try to read it and cause them to take their eyes off the road so that they're not watching children playing in the street.

Q Wouldn't you agree that the very purpose of a for-sale sign is to distract somebody to pay, so that they pay attention to the house for sale?

MR. SUMMERVILLE: I object to the leading and suggestive form of the question and if she's not a party you're not entitled to lead her. I object to the form of the question.

MR. MARGO: Q You may answer.

A Could you repeat the question please?

Q Would you read it back?

(Previous question read back by Court Reporter)

REPORTER: [13] Would you agree that the very purpose of the for-sale sign is to direct somebody so that they pay attention to the house that is for sale?

A Yes.

MR. MARGO: Q And with regard to aesthetics, would it be your testimony that a for-sale sign is pretty or not pretty, how would you determine?

A I consider a for-sale sign a necessary evil of having your house on the market and trying to sell your house.

Q So am I correct that you're willing to put up for lack of a better term, an ugly for-sale sign but not an ugly sign that states somebody's opinion?

A Correct.

\* \* \* \*

[21] Q Let me ask you if, well let me ask you first, do you know the residents who live at No. 5 Willow Hill?

A Yes.

Q Are you aware that they have a sign on their front lawn?

A I was as of a week ago.

Q Okay, and it's a sign, it's a Santa Claus carrying packages, isn't it?

A Yes.

Q And it says Dear Santa, Julie lives here.

A Yes.

Q Do you find that objectionable?

A It's considered a sign, no I do not.

Q So then the problem is what the sign Mrs. Gilleo wants to put up says, isn't it?

MR. SUMMERVILLE: I object to the leading and suggestive form of the question, subject to that you may answer.

A Would you repeat the question please?

MR. MARGO: Q The question is isn't the problem that you've got with Mrs. Gilleo's sign what it says?

A It is of a controversial nature, that is true.

Q And that's your problem?

[22] A Well she had a sign up about the Natural Streams Act and we didn't say anything, nobody said anything because we knew it would be taken down.

Q So, what?

A Sort of the way I feel about the Santa Claus or I guess I know it's coming down, it's like a yard card on someone's birthday, it will be up and then it will come down and everyone minds their own business and pretty neighborly so we don't say anything.

\* \* - \* \*

[23] Q Let me rephrase it then, maybe I can take care of his objection. Would you say that the principal reason you object to Mrs. Gilleo's sign is that it's controversial?

A Yes.

\* \* \* \*

[27] Q I only have one more question. Mrs. Gulick, when, how is it that you got involved in executing this Affidavit, did you call, take some action to get involved or did someone call you?

A Someone called me.

Q Who would that be?

A Mr. Remington, he called me for my opinion and for opinions of some of my neighbors because he knew I was a Trustee.



Q Who are the other Trustees?

A Bill R-e-i-s-n-e-r and Larry Stacy.

Q And—

A —Stacy is S-t-a-c-e-y.

Q Thank you. Now in this Affidavit, are you speaking on behalf of the Trustees or just on your own behalf?

A The Affidavit that is mine.

[28] Q Did you confer with Mr. Reisner or Mr. Stacey about this situation?

A Immediately.

Q And what did each one of them say?

A They are in support of the fact that we do not want signs in our neighborhood.

Q Any signs or this particular sign, did you discuss that?

A Signs that are of a, have an opinion on them.

Q So am I correct then that the discussion was that the three Trustees agreed that they did not want signs in their subdivision that contained an opinion?

A Correct.

\* \* \* \*

[37] Q Okay. Would you tell me please starting with the [38] first conversation you've ever had with Mr. Remington or Mr. Summerville, everything that they sent to you about this case?

A Mr. Remington called me on Wednesday afternoon and asked me as a resident of Willow Hills and as a Trustee what I thought and what the neighborhood thought, if I could get a feel of what people thought and I said yes. I called him back and said most people do not want signs in this neighborhood, a few that I have managed to talk to this evening. So I signed that Affidavit on Wednesday stating I personally do not want signs for these reasons and then I was told that was Wednesday and the hearing was Wednesday afternoon. Thursday, no that was, the hearing was Thursday, and Friday morning I was informed I had to go to court, by Mr. Remington, that I was being asked to go to court and then not being

very familiar with this whole process Jay Summerville was brought in to help me understand what was going on. I was served a Summons Friday afternoon and that was done Friday afternoon, and here we are today.

Q All right, when was the meeting at your house held?

A Friday afternoon.

Q What did Mr. Remington say at that meeting?

A He explained to everyone what was going on—

Q —can you be a little more specific than that?

[39] A Just that a suit was being filed against the City of Ladue because of the—

Q —did he say who was filing it?

A Yes, and that this was very important because we do not want to tramp on people's freedom of speech, nobody wants to do that. But what we're objecting to is the sign, we don't want to make it any bigger than it is.

Q Did the controversial nature of the sign come up in this discussion?

A Only because it caused Margaret to go to the City of Ladue and say I need police protection, my signs are being vandalized, they just brought it was brought to their attention that if she could possibly come to me as a Trustee first this all might not have happened.

Q Did Mr. Remington say anything about the controversial nature of the sign leading to trespassing and vandalism?

A That was in the newspaper article and everybody had read that.

Q Right, I want to know if Mr. Remington addressed that topic?

A I believe so.

Q Okay, and Mr. Summerville?

A No Mr. Summerville listened. This is—

Q —I'm sorry, are you finished?

[40] A I'm finished.

Q Did Mr. Remington say that he too believed that the controversial nature of the sign would lead to vandalism in your neighborhood?

A Yes.

Q And did he say that was a good reason for being against the sign?

A That was one of the reasons for it, yes.

Q One good reason.

A Yes.

(There was a brief pause)

MR. MARGO: Q How long did the meeting take?

A It lasted an hour.

Q Is there anything else that Mr. Remington said at that meeting that you haven't told me about?

A No I don't believe so.

Q Did anybody at that meeting other than Mr. Remington talk about the controversial nature of the sign?

A Yes.

Q Who?

A Sue Dorris and Ann Wolfing. I think that was it, yes.

Q Okay, what did Mrs. Dorris say?

A That she was opposed to Margaret's feelings.

[41] Q Did she say that it was the contents of what the sign said that she objected to?

A Yes.

Q And did she say that was the reason she didn't want this sign up in the neighborhood?

A Yes, that was.

Q And Mrs. Wolfing, what did she say?

A She was objecting to Margaret's feelings on the Persian Gulf as well.

Q That was the reason she wanted the sign taken down or not allowed to be put up?

A Well yes, yes.

Q Did anyone else at the meeting express that feeling?

A We really didn't discuss the Persian Gulf, we discussed signs versus no signs and the fact that there are other ways for her to express her feelings. That was the big issue at that meeting.

There were other ways for Margaret to go about it, that we looked the other way when she put up her Natural Streams Act and that was equally controversial at the time because we're neighborly, we're not controversial people, we mind our own business and we get along, and so that was what we were objecting to.

Why didn't she come to us first and why didn't [42] she, if she feels this strongly about something, anything, Streams or the Persian Gulf or anything there are other ways for her to express herself just please not with a yard sign.

Q Did anyone else to your recollection say anything about the controversial nature of the sign at this meeting?

A Only in the respect that it brought in vandals and trespassers and we certainly don't want that in our neighborhood.

Q Did anybody mention that what you needed was better police protection to prevent vandals and trespassing?

A No.

Q As you sit here today are you comfortable with the idea that nobody in your neighborhood was a vandal or trespasser with regard to this sign?

A I am. And I walked past it twice a day to go to school and I'm not so sure that it wasn't mud and rain because it was listing to the right for several days before it finally fell down.

\* \* \* \*

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

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Civil Cause No. 90-2396-C-7

MARGARET P. GILLES

v.

CITY OF LADUE, EDITH J. SPINK, MAYOR OF THE CITY  
OF LADUE; THOMAS R. REMINGTON, GEORGE L. HENS-  
LEY, GALE S. [sic] JOHNSTON, JR., ROBERT A. WOOD,  
ROBERT D. MUDD, GEORGE FONYO, AS MEMBERS OF  
THE CITY COUNCIL OF THE CITY OF LADUE

---

Be It Remembered that on the 26th day of December,  
A.D., 1990 before the Honorable Jean C. Hamilton,  
United States District Court Judge, the following proceed-  
ings were had in the above styled and numbered cause:

PROCEEDINGS

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TESTIMONY OF MARGARET GILLES

[6] Q Would you state your name please?

[7] A Margaret Gilles.

Q Are you a resident of the City of Ladue?

A Yes I am.

Q How long have you been a resident there?

A A little over a year.

Q Do you live in a subdivision there?

A Yes I do.

Q What is the name of that subdivision?

A Willow Hill.

Q Let me ask you if you've ever seen a sign like this  
one before?

A Yes I have.

Q Can you tell me, is this your sign?

A Yes it is.

Q When is the first time that you obtained a sign,  
either this sign or one like it?

A One like it in early December.

Q Do you know the exact date?

A I don't remember the exact date.

Q Okay. And that was the purpose that you obtained  
this sign?

A To place in my yard.

Q Where did you get the sign from?

A From the St. Louis Forum For Peace in the Persian  
Gulf.

Q Are you a member of that organization?

[8] A Yes I am.

Q And what was your thought in deciding to put this  
sign on the front lawn of your home?

A We are terribly concerned about the dire situation  
in the Middle East. I don't think anyone really wants to  
get engaged in a war. We felt that it was important that  
people let their elected representatives know and I know  
I had to be sort of pushed into write to your Congress-  
man, call your Congressman and we wanted to have a  
campaign to have everyone to get into this, to contact  
their Congressman.

Q Did you place that sign like that one in your front  
yard?

A Yes I did.

Q Do you remember the date?

A Yes, December 8th.

Q Okay. What if anything happened to that sign?

A It disappeared.



Q What did you do next?

A I got another one and I put it in my yard two days later.

Q Did anything happen to that sign?

A Yes, the next day I found it, it had been pulled out of the hole and thrown on the ground about ten feet from the hole.

Q Is that in fact, this sign right here?

[9] A That exact sign?

Q Yeah.

A No.

Q Okay. Were you concerned when your sign was pulled out of the ground?

A Yes I was.

Q Did you do anything?

A Yes, I called the police.

Q And who did you speak with?

A I don't remember exactly.

Q What did you say to the police and what did you hear from them?

A The first time I said, "I had a sign in my yard and it was stolen or gone" and the policeman came over and we talked about it and he said, "You want to make a report" and I said, "Yes, I want to report this".

Q Did there come a time that you became aware that Ladue had an ordinance preventing you from placing this sign on your property?

A Yes.

Q How did you find that out?

A Well, I actually had heard about an ordinance, but I'd had another sign up for about two weeks, before the last election, for natural streams, so I just thought that it was okay in my neighborhood.

[10] Q When you called the police did they tell you anything else about an ordinance?

A Yes, he said "There's an ordinance against it" and I said, "Well, I see" or something and then I got the

other sign, put it up again, called the police again and they said "There's an ordinance" and I said, "Alright, what can I do about this, I think I have the right to put the sign up" and they said, "Well you can come in and talk to City Hall".

Q Did you do that?

A Yes I did.

Q Do you remember the date?

A You mean which date did I first go in?

Q Yeah.

A The 12th of December.

Q Okay. Did you speak with someone there?

A Yes.

Q And what was that conversation?

A I said, "I want to put a sign up" and they said, "What does it say" and I told them what the sign said and they said, "Well you can't do that" and I said, "Can I speak to someone" and they said, "Yes, you can talk to Mr. Hankins" and they said, "Well he isn't here".

Q Do you know who Mr. Hankins is?

A The Clerk, I believe.

Q And what happened next?

[11] I said,—oh, they said, "Here's an ordinance you can go home and read it and come back the next day if you'd like".

Q I'd like to hand you,—

MR. MARGO: I think we've stipulated that that's a copy of the ordinance.

THE COURT: Why don't you mark it anyway, it will be easier in the record.

BY MR. MARGO:

Q Let me hand you what's been marked for identification as Plaintiff's Exhibit 2, do you recognize that document?

A Yes I do.

Q Can you tell the Court what it is?

A It's the ordinance regulating signs in Ladue.

Q Did you take that ordinance home and read it?

A Yes I did.

Q And what if anything did you do next?

A I came across Section 35-5, which says that,  
 "The Council may grant a permit required by this chapter and permit a variation in the strict application of the provisions and requirements of this chapter. Where there are practical difficulties or unnecessary hardships or where the public interest will be best served by permitting such variation."

[12] Q And when you read that section, did you decide to take action?

A Yes I did.

Q What did you do?

A I went back the next day and I pointed this to the person and I'm sorry I don't remember her name, in the City Hall. I asked to see Mr. Hankins and she said, "He isn't in," I said "Well, I would really like to put up a sign" and she said, "You can go talk to Chief Dierberg".

Q Did you?

A Yes I did.

Q What did Chief Dierberg say?

A He asked what the sign said, I told him. He said, "We can't allow that, there's an ordinance" and I pulled this out and I said, "Chief Dierberg, there is a section and I'm asking you for a permit because of unnecessary hardship, because I think a war would be about the most unnecessary hardship that we can have" and he said, "Well, it's my job to enforce the law as it stands, but you may come and petition the Council." He said, "Only the Council can grant you a permit".

Q Did he tell when to petition the Council?

A Yes, he said "Come in on Monday at four o'clock."

Q Okay. Did you go to a City Council meeting on Monday, at four o'clock?

[13] A Yes I did.

Q Okay. Do you remember the date of that meeting?

A The 17th.

Q And did you address the Council that day?

A Yes I did.

Q Okay. What did you say?

A I told them what had happened. I told them how I had put in a sign and it had been removed and how I had put in another sign, how I called the police, how I had then gone to the City Hall twice, that I had talked to Chief Dierberg and he had advised me to speak and that I was requesting the sign for unnecessary hardships.

Q Okay. Did anyone at the City Council meeting tell you that you hadn't properly applied,—oh, well let me ask you this first. Did you bring to the attention of the Council, Section 35-5?

A Yes.

Q Okay. Did anyone at the council meeting tell you that you hadn't properly applied for a permit?

A No.

Q What happened next?

A Well I first made this request and Mayor Spink said "We must wait for Tom Remington".

Q Okay.

A "Would you, could we postpone this discussion" and I [14] said "Sure" and I sat down.

Q Do you understand Tom Remington to be the President of the City Council for Laude?

A Yes I do.

Q Okay. Did there come a time when you addressed the City Council again, during that meeting?

A Yes I did.

Q Okay. And this time can you describe what happened?

A I made my request again, explained the whole thing again, why I wanted to put up the sign and then, some other people spoke.

Q Okay. The other people, were these people supporting your position?

A Yes they were.

Q And were these members of the community?

A They were members of Ladue, residents of Ladue.

Q Okay. Did the City Council take any action at that point?

A After I believe, four other people spoke, yes, Mayor Spink said, "Does anyone want to address this issue" and Mr. Remington said "Yes, he would address it" and,—

Q What did he say?

A Well, he said that he understood what I was asking, but that he did not want to take a chink out of an ordinance that had served the City well.

[15] Q Okay. Did any of the other council members address the issue?

A Yes, Mr. Mudd did.

Q What did he say?

A He said "He didn't want to drive home through a thicket of opinions, that it would look like junk city".

Q In all, do you recall how long the City Council discussed your request for a variance?

A I guess about five minutes, I don't remember exactly.

Q Was there then a vote taken?

A Yes there was.

Q Can you describe that?

A Yes, Mr. Remington, I believe, moved to deny the permit. Someone seconded it, I'm not sure and then I think the Mayor called for the question, they all voted to deny the permit.

Q Is the Persian Gulf, a issue of the day, that you feel particularly concerned about?

A Yes I do.

Q What is it that you would like this Court to do?

A I'd like them to grant me an injunction to put up the sign.

\* \* \* \*

[16] Q Good afternoon Ms. Gilleo.

A Good afternoon.

Q Ms. Gilleo, could you describe for us very briefly, your educational background?

A Yes. I have a Masters Degree from Columbia University, in New York, a Bachelors, from Maryville College, here.

Q I take it, that you have lived in Willow Hill subdivision in Ladue, for just over a year, is that correct?

A That's correct.

Q Ms. Gilleo, obviously you're a highly educated woman, would you agree with me, that most of your neighbors in the Willow Hill subdivision share that characteristic?

A Yes, uh-huh.

Q Okay. And you obviously think about compelling world issues and absorb information about them and form opinions about them, is that correct?

A Yes I do.

Q Would you concede for me, that most of your neighbors in the Willow Hill subdivision, share that characteristic as well?

A Yes.

Q Okay. Can you describe for the record please, very briefly, what your subdivision is like?

A It's a very lovely subdivision, it's a dead-end street. I think there are about fifty houses, I'm not sure of the [17] I think there are about fifty houses, I'm not sure of the exact number.

Q Okay. Am I correct, that the only entrance to your subdivision, is off of Ladue Road?

A That's correct.

Q Okay. It is not a thoroughfare of any kind, is it?

A No.

Q Would you describe for me, what you expected your audience to be, with the sign; and I don't believe it's been identified.

MR. SUMMERVILLE: Do you want to give that a number?

MR. MARGO: At this point, I'd ask that the sign be identified as Plaintiff's Exhibit 1, and following the



cross examination, I'll move for them both to be entered into evidence.

THE COURT: Fine.

MR. SUMMERVILLE: No objection.

MR. MARGO: May I also ask, that from here on in, if we can agree that references to the sign mean exhibit 1?

MR. SUMMERVILLE: Of course.

BY MR. SUMMERVILLE:

Q I'm sorry, I think I think I asked you, whom you intended your audience to be, with the sign?

A Well, anyone who drove by.

[18] Q Okay. Would it be fair for us to assume, that the principal audience would be the residents of your subdivision, in the approximate fifty homes and their social guests?

A Yes, but there are also people who work for these residents.

Q Okay. I used the word primary. I'm sure that there are tradesmen who come to the subdivision, but it is not generally a public thoroughfare, is it?

A No, it's not a public thoroughfare.

Q Okay. And so your principal audience would be your neighbors and their guest, would it not?

A Yes and people who work in their homes.

Q Okay. Now Ms. Gilleo, nobody of course, questions the fact that you feel strongly about the issue that's the substance of the sign. Did you give consideration, before you put the sign up in your yard, to any alternative means that you might have, to communicate the same message to your neighbors?

A I wrote a letter to the *Post Dispatch*, the editorial section.

Q Let me ask you this, would it have been possible for you to have xeroxed the same message, "Say no to war in the Persian Gulf. Call Congress now" and even sign your name, Margaret Gilleo, fifty times and to de-

liver that to the doors of your neighbors in the subdivision?

[19] A Yes, it would have been possible.

Q And can we agree, that the cost for that, would have been nominal, less than ten dollars?

A Sure.

Q Okay. Would you concede for me, that you could have written a personal message and mailed it to each of your neighbors, in the fifty homes in the subdivision?

A Yes.

Q Did you have any reason to believe that your neighbors would not be receptive to either of those forms of communication from you, one of their neighbors?

A No.

Q Alright. Would it have been possible for you Ms. Gilleo, to have used the telephone for example and although it might have taken more time to make fifty or however many telephone calls were necessary, to call your neighbors?

A Yes.

Q Do you have any reason to believe, that with that personal kind of a contact, your message might have been even more effective and identifying you, as one of their neighbors, as the person who had this strong feeling?

A I don't know that it would have been more effective. It would have been a different way of doing it.

Q Okay. Do you generally find that the residents of the Willow Hill Subdivision are friendly, cordial, nice people?

[20] A Oh, yes.

Q As I'm sure you are?

A Yes.

Q Okay. Would you agree with me, that the neighbors that you have in Willow Hill, have available to them, newspapers of different view points, as well as radio and television and cable television?

A Yes.

Q To get news of the world, including opinions?

A Yes.

Q Okay. Did you consider, I believe you did say that you considered writing a letter to the editor, is that correct?

A I didn't consider it, I did it.

Q You did it, okay. Did you consider the alternative of possibly putting a bumper sticker on your car?

A I didn't consider it, I did it.

Q You did it, okay. And did you park your car in your driveway so that it was legible to people,—

A Yes.

Q —coming and going?

A Uh-huh.

\* \* \* \*

[33] Q Ms. Gilleo, when you obtained the sign that you placed in your yard, approximately how many minutes did it take you to hammer it into the ground?

A I don't know.

Q Did it take you more than five minutes?

A Oh, no, two or three I guess.

Q Okay. Mr. Summerville asked you if you had considered calling all your neighbors, do you think that would have taken quite a bit more time than hammering this into the ground?

MR. SUMMERVILLE: Objection, leading and suggestive.

THE COURT: Sustained.

BY MR. MARGO:

Q Do you have any estimate as to how long it would take you to call all your neighbors?

A Well, if I called fifty, times say, five minutes.

[34] Q Do you think it would take you longer?

A Oh yes.

Q Do you think it would take you longer to mimeograph fliers and send them to all your neighbors?

A Yes.

Q Also, Mr. Summerville asked you, if you had sent fliers to all your,—he mentioned sending fliers to all your neighbors or calling them on the phone.

A Uh-huh.

Q Do you believe that if you had done that, you would have reached their guest?

A No.

Q Do you believe you would have reached their employees?

A No.

Q Do you believe you would have reached the workmen, who come to their homes for repairs?

A No.

Q Do you believe you would have reached the delivery persons, who make deliveries in the neighborhood?

A No.

Q Do you believe you would have reached the city employees, who service your neighborhood?

A No.

\* \* \* \*

#### TESTIMONY OF THOMAS R. REMINGTON

[37] Q Would you state your name for the record?

A Thomas R. Remington.

Q Mr. Remington, what is your address, your residence address?

A 67 Pointer Lane, in the City of Ladue.

Q What is your business or occupation, sir?

A I'm an attorney.

Q Could you give us very briefly, your educational background?

A I'm a graduate of Princeton University and of Harvard Law School. I was also a Fellow at the University of San Andrews, in Scotland.

Q Okay. You're a practicing attorney at law?

A I am.

Q And do you practice with the law firm of Armstrong, Teasdale, Schlafly, Davis & Dicus?

A I do sir.

Q And are we partners?

[38] We are indeed.

Q Mr. Remington, do you hold any official office, in the City of Ladue?

A I do.

Q What is that office?

A I'm the Alderman from the 1st Ward and I'm also President of the City Council.

Q Alright. Can you tell me how long you have been Alderman of the 1st Ward?

A Fifteen and a half years.

Q And can you tell me, does that ward include the Willow Hill Subdivision, where the Plaintiff, Ms. Gilleo resides?

A It does.

Q Alright. How long have you been the President of the City Council of Ladue?

A The same period, fifteen and a half years.

\* \* \* \*

[41] Q Okay. Can you tell the Court how you regard the privacy and the tranquility and the peacefulness of the residential areas of your city, as they go, un-objective, how important is that?

A I'd say it's of the primary importance. It is the primary attraction of people to our city, is the residential character of it. The ability to leave the hussle and bustle of their jobs, whether they be lawyers or doctors or engaged in commerce, they come home in the evenings, they find a peaceful, quiet, safe, neighborhood. This isn't escapism it's a change and it's a change I think we all welcome.

Q Okay. In what ways, if at all, does the City of Ladue, through other ordinances, other than perhaps the ordinance [42] that we're considering in this case, try

to express that desire to maintain the privacy and tranquility of it's residential neighborhoods?

A I think the primary example here, would be our quite extensive and complex zoning ordinance.

\* \* \* \*

Q Yes, I was asking how does the City of Ladue generally, with it's other kinds of ordinances, other than particularly the one that we're engaged in considering in this case, try [43] to foster, if it does, those goals that you have testified about, preserving the privacy and the residential tranquility of it's neighborhoods?

A I've mentioned the zoning ordinance, there are others. There are the general provisions with respect to the police powers of the state over speeding, traffic control, that sort of thing. We have ordinances which attempt to regulate and constrain commercial activity to the commercial areas of the city and try not to let or allow commercial activity in the residential areas of Ladue.

Q Is the privacy of the residents of the City of Ladue a concern of yours, as a councilman?

A A very great concern.

Q Is the safety of the residents of the City of Ladue, a concern to you, as a councilman?

A A very great concern.

Q Is the maintenance of certain aesthetic quality, of importance to you, as a council member?

A It is also of importance.

\* \* \* \*

[50] Q Alright. Now could you describe, just very briefly, the organization of exhibit 2, the nature of the Sign Ordinance and how it is set forth, with respect to what it allows and does not allow and I mean in general?

A In very general terms, it prohibits the erection of signs in all areas of the City of Ladue and then, in one section creates a series of exceptions to that prohibition. It permits the erection of signs in certain instances. There are more difficult and longer provisions, which deal with



the categories of commercial signs, which can be erected in the commercial districts, defining the size, the placement, location, that sort of thing, of commercial signs.

Q Okay. Now, with respect to the applications for waiver, under Section 35-5, that you had considered in the past, can you tell me what discretion you believe that you had and how you exercised that discretion, in deciding how you would vote on any application for a variation?

A Well, I think I ought to start by saying, that the only applications we have had prior to Ms. Gilleo's, have been for variations in the commercial areas of the city. I can recall none that came to the council when I was sitting on it, that [51] dealt with the residential areas, or somebody's desire to put a sign in the residential area. The commercial applications have been quite frequent. We may hear from a shop keeper along Clayton Road, who the entrance to her shop is in the back of the building, that rather than just have a sign over her door, which will not identify where she is to people who are on the front of the building where most of the traffic is, we permit some type of sign along the front of the building or the side of the building, to identify that she is selling needle goods or something of the sort, in the back of the building. We also will have requests for variations in the size of the sign. Our sign limitations maybe very much too small for somebody who has a very large storefront and we do exercise our best judgment, to prevent the hardship that would come on that person of having a sign lost in the medley. The hardship that would come in not being able to identify your premises if it's in the back of the building. I think throughout, even in the commercial area, our concerns are with the general character of Ladue, as a low key city, private city. We do not permit garish signs, billboards with some lady with a diamond in her navel or something of the sort, to attract attention, because that's going to divert people's attention from doing what they ought to do on commercial streets, as well as residential streets and that's drive their cars

safely. We are also frankly concerned with [52] the aesthetics, but I think in the order of proceeding, we're first and foremost, committed to the privacy, the general aura of the community, secondly, the safety and third, the esthetics.

Q In applying 35-5, to determine whether a variation should be granted in the strict application of the sign requirements with respect to commercial signs, what did you interpret the scope of your discretion to be and how, if at all, did you believe it was limited?

A We feel that the, and I feel, that the variation provision in 35-5, is directed towards those signs which the city has identified in Chapter 35, as being permissible signs. Permissible albeit, with some restrictions as to size, placement, etc. This would include of course, all the commercial signs. It would also include somebody's attempt to vary the provisions as it relates to a For Sale sign or identification sign of name and profession. But we feel that it is directed towards those situations of commercial and the exempted signs, not to signs in general.

Q Okay. Did you interpret 35-5, to give you the discretion to grant a waiver to permit the erection of signs which are not otherwise permitted, of a type not permitted, by the ordinance?

A I do not feel that it does lead us to the ability to grant variances in those cases where the Sign Ordinance does [53] not permit the signs.

Q Now focusing your attention on Ms. Gilleo's application to the council, on December 17, 1990, I believe you've indicated earlier, that that was the first application that you were aware of, from a resident, for a waiver, under Section 35-5, for the erection of a placard in a front yard, is that correct?

A That is correct.

Q Alright. When you considered that application Mr. Remington, did you believe that you had the discretion under Section 35-5, to allow a waiver for a sign such as that Ms. Gilleo wanted to erect in her front yard?

A No, I did not feel we really had the discretion to go into the area of signs that were not called for under the ordinance and that's on reflection of and re-examination of the ordinance.

Q Okay. Now, leaving aside that belief, that you did not have the discretion, did you, as a resident of Ladue and as a member of the City Council, would you have favored the allowance of such a sign, as exhibit 1, in Willow Hill, in Ms. Gilleo's yard.

A I don't like such a sign, as,—

Q Well,—

A Any sign of any nature, in a residential setting, I would not favor.

[54] Q Alright. And could you give us your reasoning and your rationale for that position?

A Well the first and foremost, is what we've discussed already, the general nature of the community, the desire of it's residents for privacy. Second, I think safety considerations have to be brought into view. Any sign is an invitation to distraction. It is, by it's very nature, attempting to attract attention, some more verminously then [sic] others. So I think we would have to look at each sign, in connection with the safety implications. Third area, of course, is the esthetics. While I don't think that can stand on it's own, to prohibit a sign, I think it is something that we would, —given the other two considerations or a strong consideration for privacy or safety, we would also consider esthetics.

Q Okay. Now in giving your consideration as to whether you would vote for or against Ms. Gilleo's application for a waiver, did you give any consideration whatsoever, to the nature of her viewpoint, as expressed in exhibit 1?

A I did not.

Q Okay. Are political signs at the time of political campaigns and elections, allowed in the City of Ladue, by ordinance?

A They are not allowed.

Q Okay. And is that ordinance enforced by the Police Department?

[55] A Yes, I'm certain it is.

Q Alright. And to your knowledge Mr. Remington, does the Police Department make any attempt in the enforcement of that ordinance, to discriminate between Republican signs or Democratic signs or pro one side of an issue or against another side of an issue, at the time of an election, in removing signs from yards and enforcing the ordinance?

A I do not believe they do.

\* \* \* \*

[56] Q Okay. Can we agree and I think you so testified, that the issue of esthetics, standing by itself, should not, under any circumstances, defeat a person's First Amendment Rights?

A I have, —I would agree with that.

Q Okay. Can you tell me in what way your privacy could be invaded, so to speak, if a sign were placed on Willow Hill in front of the Plaintiff's home and you live on Pointer Lane, some quarter of a mile away, unless you drove over there to look at the sign?

A I think my privacy is not as greatly affected as those who are, not trapped, but those who are day after day, come in there. They're a captive audience. The privacy of those individuals is much more severely affected than I am.

\* \* \* \*

[63] Q Thank you. Did I understand correctly, that you now believe, as you sit here today and testify, that the council did not have discretion, under Section 35-5, to authorize a variance and issue a permit?

A That is my belief.



Q I see. Why then, did you permit the plaintiff to make a statement and to even file an application and request a variance?

A I think that's a fair question and I think the answers lies in the fact, number one, in the application of this law, we have never considered it or had it applied for, a variance under this section, on personal property. Secondly, in the throws of examining what's occurred over the last weeks, we've all done a lot of study and re-examination of that ordinance and as I look at it today and for the last several days, it seems to me, that the statutory scheme is as I've stated here this afternoon.

Q I see. So then, it took you several weeks of study and [64] review and discussion with your colleagues, to make the determination on exactly how that ordinance should be applied?

MR. SUMMERVILLE: Objection to the form of the question.

MR. GREEN: I'm sorry.

MR. SUMMERVILLE: I don't think there's been a reference to weeks.

MR. GREEN: I thought he said two weeks.

THE WITNESS: Two days.

MR. GREEN: Oh, did you say the last two days? I thought you said two weeks, I'm sorry.

THE WITNESS: The last two days.

MR. GREEN: Well, let me rephrase the question then.

THE WITNESS: Okay.

BY MR. GREEN:

Q So it took you several days, a lawyer with many years experience, discussions with your colleagues, careful review of the ordinance, especially Section 35-5, to reach a conclusion that differs from the conclusion you had reached when the application was filed and considered? Is that a correct statement?

A That is a correct statement, yes.

Q And is it because at least in part, that that particular [65] section of the ordinance is somewhat vague?

A I think that section of the ordinance is pretty clear. It's because the ordinance itself, is seven, eight, nine pages of rather complex do's and don'ts. And it's only through a fairly intensive review of that whole statutory scheme, that I've come to that conclusion.

Q Do I understand then, that if an application for a private resident sign, such as exhibit 1, were made today, you would not even permit the application to be considered by the council?

A I don't think Section 35-5, addresses this type of sign.

Q Alright. Is there any other section in the ordinance, that does address that type of sign?

A I don't believe so.

Q Okay. Can we agree then, that under no circumstances could a private residence put up a sign in their front yard, of any size, shape, character or otherwise? In your judgment, based upon the Ladue ordinance in question?

A Unless it came within the provisions of 35-2, which calls for certain exceptions to the prohibition against signs. It would be a relief from extending those further, with a good case made, I think that the council would consider it.

Q Did you consider the exhibit 1, to be a controversial sign when you discussed it at the council meeting on Decem- [66] ber 17th?

A I really didn't pay all that much attention to what the sign was saying. I believe it is a controversial sign. As I said, "Nuk Baghdad" would be one, but that was no basis for my action or opinion that evening, that the ordinance, even if we said it did apply to these things, is completely content neutral. It doesn't say you can have Republican signs, but not Democrat or vice versa. So, the character of the sign, I think I have to say in all fairness,



is controversial, but it formed no basis for the action that the city took that evening.

Q Okay.

A Or at least my action, I can't speak for the others.

\* \* \* \*

### TESTIMONY OF EDITH J. SPINK

[69] Q Would you state your name for the record please?

A Edith J. Spink.

Q Ms. Spink, where do you reside?

A At #9, Log Cabin Drive, in Ladue.

Q How long have you been a resident of the City of Ladue?

A Since 1967.

Q Are you presently serving as the Mayor of the City?

A I am.

Q How long have you held that office?

A Since April of 1975.

\* \* \* \*

[72] Q Ms. Spink, let me ask you first of all, what importance, if any, do you attach as Mayor, to the preservation of the privacy and tranquility and peacefulness of the residential neighborhoods of the city?

A I attach a great deal of significance to that. I have been very active as a volunteer and I'm at the City Hall, almost daily for six to seven hours. I see people on the street or when they come into the City Hall or at various business and social engagements. They attach a great deal of significance to the preservation of our safety and privacy and esthetics. I've been very active in beautifying the City of Ladue and I've had a great many compliments, particularly on the planting around City Hall, Clayton Road and the council has been very supportive in our esthetic efforts.

Q Now you mentioned that others have those priorities and goals. Do you share those goals of,—

A Yes I do.

Q —privacy, safety and esthetics?

A Yes.

Q Alright. In what ways as Mayor, do you seek to foster the privacy, the safety and the esthetics of the residential neighborhoods of the City of Ladue?

A Well we try to enforce our ordinances, relating to [73] those. We have adopted the *Voco* (phonetic) existing building law, so that anybody who's house needs repair, that we can get them to do that. I particularly, if I see a sign that should not, is not allowed, under our ordinances, I will call the police and report it; I have a telephone in my car, that is my own, not the city's and I can't tell you, but I've spent a great deal of my own money, calling the police to report unauthorized signs. I have several committees in the city, on which about a hundred and twenty-five residents serve and I find that Ladue is a very special community. Many people who have moved out west for instance, out on Mason Road and other places, have moved back to the City of Ladue, because they say that there you have the tranquility, not the large traffic problems and they just like our community.

Q Alright. Now you'd mentioned in your answer to my last question, that from time to time, you actually call into the police, to report signs which you believe maybe offensive to one of the city's ordinances, is that correct?

A That's correct.

Q Now, do you believe or have you believed, that yard signs of any nature, other than For Sale signs are permitted in Ladue on residential property?

A No they are not permitted.

Q Now have you had occasion in the past to call the police [74] to report yard signs of one nature or another, that you believed offended the sign ordinance?

A Yes.

Q Did those include political signs?

A Yes.

Q Did those include signs on issues of public interest of the day?

A Yes, one was on the Clean Streams Act.

Q Okay. And when you make those reports or have in the past, to your knowledge, have the police followed-up and gone to those properties and resolved the situation in one way or another?

A Yes, several times I've spoken to Chief Dierberg and maybe an hour or two later, he'll come in and say "You're right, the signs have been taken care of".

Q Okay. In any of those occasions, Ms. Spink, have you distinguished between signs, based upon the nature of the message on the sign? That is, whether it was on one side of an issue or on another side of an issue? Or a Republican sign or a Democrat sign?

A No. If I may be facetious, at the council meeting, I said, "even if someone wanted to put my picture on their lawn, that that would not be allowed," vote for me for Mayor.

Q Okay. Do you have any knowledge at anytime, Ms. Spink, when the Police Department has intentionally failed to en- [75] force the Sign Ordinance with the City of Ladue, with respect to any particular signs, on account of the particular point of view expressed on the sign?

A No.

Q Okay. Now having reviewed exhibit 2, ma'am, let me ask you first of all, whether you believed that yard signs, yard placards in residential neighborhoods, other than For Sale signs, are permitted by the ordinance?

A No.

Q Okay. Is it your opinion that they are not?

A My opinion is that they are not permitted.

Q Thank you. Now do you believe, based on your review of the ordinance, that the City Council of Ladue, has the discretion to grant a variance or a waiver of the requirements of the ordinance, under Section 35-5, to

permit a yard sign or a placard, on a residential lot, in the City of Ladue, other than a For Sale sign?

A No, on reflection, as I said, I had a great deal of time to study this over the last two days, I don't feel that you can grant a variation on any kind of a sign that's not permitted in the ordinance.

\* \* \* \*

[78] Q How important is esthetics to you?

A I think that esthetics are extremely important. That was one of my campaign pledges, that I would try to improve the appearance of Ladue and I think that we have done so, over the last fifteen years, with the help of the council. I can't do anything on my own. All I can do is make recommendations and then, the City Council approves or disapproves them.

\* \* \* \*

[82] Q And you're real concerned; and you may have expressed this to some extent, in the fact that there maybe this sign on the plaintiff's front lawn, it could result in what we'll call a proliferation of other signs, that would detract from the beauty of the city, because you would have a lot of signs all over. Isn't that basically a correct statement?

A Yes.

Q Okay. Now that would be what we refer to and have referred to during this hearing and the deposition, as the as the esthetics issue, isn't that correct.

A Yes.

Q Okay. Now the esthetics issue though, does not in any capacity, arise to the height of the First Amendment issue that we're discussing, does it?

[83] MR. SUMMERVILLE: Your Honor I'm going to object, that that asks for an expert legal opinion. I believe the Court will be the Judge of the law.

MR. GREEN: Only as to her belief.

THE COURT: You can ask it as to her belief.



THE WITNESS: I believe that sometimes the First Amendment can be overruled by other instances. Not that you are prohibiting anybody,—

MR. GREEN: Uh-huh.

THE WITNESS: —from speaking, but by the same token, I think that the Constitution guarantees the right to privacy and we're sworn to uphold the safety and the health and welfare of the community. It's like yelling fire in a crowded theater, you can't do that and that certainly is against freedom of speech.

\* \* \* \*

[84] Q What I'm really asking you is, you don't believe personally, that the issue of esthetics, that we've been discussing, rising anywhere near the level of an individual's First Amendment Rights in Ladue, do you?

A Well I really don't think that we are prohibiting somebody from expressing themselves, there are many other ways that they can do it besides having a yard sign.

[85] Q I see. Is it then your position, as I understand your views, that because there are other ways for plaintiff in this case to express herself on her views, that she should use those other methods and not this particular way, by putting a sign in her front lawn?

A I believe that.

Q Okay. And is it the fact that those other methods would not in anyway, interfere with the esthetics of Ladue, where the sign would?

A Well, it could interfere with the esthetics, if people threw them on the ground and didn't pay any attention to them, but normally I would say that it would not interfere with our esthetics.

Q Okay. When you say threw them on the ground, what are you referring to?

A Threw any, whatever, if she did it by pamphlets or some other way.

Q I see. So the esthetics issue; and I don't mean to beg the question and repeat myself too often, but that's your principal concern?

A That's a very important, —esthetics and right to privacy and the safety, because I think they're all wrapped in together.

Q I see. Can you tell me then, how the residents of Ladue, how their right to privacy would be affected in [86] any-way, by having a sign placed on the plaintiff's front lawn?

A Well, you might want to look out the window and all you see would be the sign. For instance, one of our neighbors wanted to put up a tennis court, in their front yard and every time we looked out the window, we would see somebody playing tennis,

Q I see.

A —and they asked for our permission and we and some of the other neighbors didn't give it.

Q I see. That would come under your deed restrictions and your,—

A No, it has nothing to do with our deed restrictions, it has something to do with our zoning.

Q Oh, I see.

A We don't allow tennis courts or swimming pools in the front yard.

Q I see.

A And it was the same idea, if you had to sit and look at something, a neighbor, that could interfere with their right of privacy.

Q Okay. That of course, would only apply to people living in the immediate vicinity of the plaintiff's home, would it not?

A That is true.

Q Okay. Were you and are you presently concerned about [87] any safety factor, if this sign, exhibit 1, were to be placed on the plaintiff's front lawn?

A Yes I am, because I'm concerned with Ms. Gil-  
leo's safety, it has already been stolen once, it's been



knocked down, I believe and she's had telephone calls that she doesn't know from whom they are and I believe that something like this could cause a problem for her, as well as safety problems for people who would come into to look at what the sign said, because of the publicity.

Q I see, okay. I believe you testified and used the phrase, that if there's a controversial sign, there could be arguments?

A There could.

Q Is that your view?

A Yes, I believe that. I've seen arguments at Winter Wonderland, where people have run over even a traffic barrier, that was placed in their yard, because they didn't like Winter Wonderland.

Q I see. When you use the phrase arguments, are you using that to mean essentially the same as the word debates?

A Debates, yes.

Q I see. And you would not want those types of debates in Ladue, in your neighborhood, would you?

A No, I believe they can have as many debates as they want, but I don't think we should encourage them. This is up [88] to the individual to discuss with other people however they feel about things.

Q I see. And then I take it, that you consider the sign itself, to be somewhat controversial, don't you?

A I consider it controversial, in the point, —because it was torn down. If it had not been torn down, I would not know whether it was controversial or not. Our ordinance isn't directed as to the content, it's directed, it's a neutral ordinance, that we would object to a sign that said "Support Your President."

Q I see. You would not object though, to a sign that said "Free the Hostages" would you?

A That was asked to me on a issue that I told you that I had not had an opportunity to study the ordinance. On reflection, I would object to any kind of sign.

Q Okay. But when your deposition was taken several days ago, I believe within the last two or three days, —

A Uh-huh.

Q —you testified, did you not, that you would not object to a sign that says "Free The Hostages" or one that says and I quote "Give Up Dope."

A That is if a residential sign was allowed. I had to read the ordinance and study it and find out that residential signs were, all residential signs were prohibited.

Q I see. When you made these statements as to the two [89] kinds of signs, that is, the content, which you would allow, "Give Up Dope" and "Free The Hostages," you were under the belief at that time, that the City Council could authorize private residential signs, weren't you?

A I, —from reading that section that you told me,—

Q Uh-huh.

A —I was under that impression. After re-reading them, I,—and I see, that you can only have a variation and that there's only certain signs that are permitted, I have changed my mind.

Q Alright.

A And if I told you, when we were having our deposition, this was all speculation on my part, that I had not had a chance to study it and that,—well, I'll say that's it.

\* \* \* \*

# TESTIMONY OF MARK G. ARNOLD

Q Mr. Arnold, would you state your name for the record?

A Mark G. Arnold.

[90] Q Mr. Arnold, where do you reside?

A 28 Willow Hill, in the City of Ladue.

Q Are you a neighbor of the plaintiff's?

A Yes, she's five or six houses down, I think.

Q What is your occupation sir?

A I'm an attorney.

Q Okay. And are you in private practice?

A Yes sir, I'm a partner with the firm of Husch, Eppenberger, Donohue, Cornfeld & Jenkins, in the St. Louis Office.

Q Could you give us very briefly, your educational background?

A I have an undergraduate degree from Oberlin College, in Oberlin, Ohio and a law degree from Washington University, in St. Louis.

Q Okay. Do you practice in any particular specialty, sir?

A I spend about half my time in litigation and the other half, in various Courts of Appeals.

Q Do you belong to any professional societies?

A Oh, the Missouri Bar, the Metropolitan Bar, I'm a member of the American Law Institute.

\* \* \* \*

[92] Q Okay. Could you tell us Mr. Arnold, why you chose to live in the City of Ladue?

A Well there were a variety of reasons. Those that I think would be relevant to the proceedings here today, the peace and quiet of the neighborhood, would be first and foremost. The feeling of safety and security, we had planned on having a family and a dog and so forth and that was important. I don't know how to quantify it, but I think the Willow Hill Subdivision is, at least in my estimation, a very beautiful subdivision and I remember the first time I was on the street, it was probably fifteen years ago, I went to a party there, when I was still living in the Tivoli Apartments and I thought I'd died and gone to heaven it was so nice, as compared to where I was. So those are the factors that I think would be relevant to what we're here discussing today. Obviously, there were others.

Q I direct your attention to exhibit 1, the sign which your neighbor would like to place in her front yard, in your subdivision. Mr. Arnold, how, if at all, do you believe that the placement of that sign in Ms. Gilleo's front yard, would affect the peace and quiet of your neighborhood, as you've described it?

A Well, I frankly would prefer that she did not put the sign up and the reason is, that the sign is, by it's very [93] nature, a kind of a controversial sign, that calls upon me, it forces itself upon me and says, you know, react, agree, disagree, says it's a better idea to send Sadaam back to the Stone Age, by thermonuclear device or alternatively, that what we're doing there, is all wrong. I would rather not be confronted with that kind of a controversial thought, when I drive into my subdivision at the end of the day. As I'm sure you know, the litigation practice, in which we are both engaged, encompasses a fair amount of contention and argument and struggling for mutual advantage and I would just as soon leave that at the office when the day is over. I guess the other point, at least the firm that I practice with, tends to be a fairly heterogenous group of people, in terms of their political viewpoints and it's not uncommon, you know, when five minutes in the lunchroom or to have lunch with some of my partners or associates and to have a political debate about the Persian Gulf situation or abortion rights or the *Nancy Kusann* (phonetic) case or anyone of another of topics of importance. And again, I enjoy that during the day, when the day is over, I like to feel that I'm off duty and I'd rather not have that sort of thing forced on my consciousness when I go home. I prefer to spend time with my wife and my kid and my dog.

Q Do you believe that Ms. Gilleo has available to her, any other methods of communication with you, that would be less [94] intrusive on your privacy?

A Well, does she have methods that will make me think and respond like this? I don't know that she does,



because if she were to telephone me, as soon as I found out what she was calling about, I would, I hope, politely, suggest I wasn't interested and I'm sure she being a lady, would respect my interest in remaining acumen. Same thing for a letter, if she puts out a flier and I'm not interested in it, I can put it to one side or just put it in the trash can. So from the standpoint of communicating to me, when I don't want to be communicated with, I think the alternatives that have been discussed are probably not going to work as well, but that that's because I don't want them to work as well. If the question relates to communicating with people in a situation in which they are either, you know, because the nature of the circumstance is such that they can be stimulated or want to be stimulated, I think there are probably dozens of alternative ways to communicate this point of view. You know, leaflets, fliers, carry a poster around Ladue, Schnucks, which is a half mile away or the St. Louis County Court House, which is a mile away and I am sure, that she would come into contact with more people in that context, than simply putting up a sign in her yard.

Q Do you believe that those methods would be more or less intrusive on your own rights to privacy?

[95] A The,—I hope you're just asking for my personal belief,—

Q Yes.

A —because I haven't gone and done legal research on this.

Q No, I'm not asking your,—

A I don't want to try and tell the Court what the law is, at least without more preparation than from a legal perspective that I've done today. In terms of what I have, which is the ability to sit at home and think about things that I want to think about and not think about things that I don't want to think about, yes, things that happen outside my neighborhood, are not going to be a problem for me.

Q Okay. Do you have any concerns about the safety of your neighborhood, based upon the sign that Ms. Gilleo would like to place in her yard?

A I do sir and it's from a different perspective than any that I've heard this afternoon. It was mentioned that this is a, it is a private street and there is one, supposedly, one entrance into the subdivision off of Ladue Road. My driveway and my next door neighbor's driveway, which we share however, run, they provide a different exit from the street. The driveway runs from Willow Hill Road, down in the back of the house, to McKnight Road, so that it is possible for a vehicle to go from Willow Hill out to McKnight and then out [96] back to Ladue Road, by means of going down our driveway, without having to go through what is supposedly, the only entrance to the subdivision. And I am concerned that when you are dealing with controversial, political topics, that it is not unusual to have people who disagree with that political sentiment, coming along to do something about it. I heard some testimony today, that the sign had been taken and then there was another occasion on which it had been thrown on the ground and the police had been called. My concern is that if the police are called and stop up the so called bottleneck, some vandal, who is interested first, in defacing the sign, because it is controversial and then in making his escape, is going to drive his car down my driveway. I have a twenty-one month old son, who likes to play on that driveway, I'm concerned for his safety. I have, for that matter, a three year old golden retriever, who is a very stupid dog and doesn't have enough sense to get out of the way of a car and I'm concerned about him too.

Q Thank you.

A My apologies to the dog.

(Laughter)



Q Are you concerned at all, about the esthetics of your neighborhood, as they would be affected by exhibit 1, the sign?

A I have a concern about it yes. I would not want, I [97] wouldn't want to suggest I'm an expert in esthetics, I'm sure my wife would have something to say about that if I did, but it isn't what I moved out there for. Billboards or signs, I mean, it's a very nice, well done sign, I certainly don't quarrel with that, but I mean, I like the trees and the grass and the shrubbery and that's one of the things that I moved into the neighborhood for.

\* \* \* \*

Q Mr. Arnold, do I understand that your basic law practice involves litigation and appellate practice?

A That's correct sir.

Q What type of litigation? Is it business or accidents or what?

A It pretty much covers the waterfront, at this time, I would say it is primarily a commercial litigation practice, by which I would mean, you know, securities law, RICO, breach of contract, corporate internesis (phonetic), corporate disputes, that sort of thing.

Q I see. So you're involved in controversy from early in the morning, until late in the afternoon, several days a week [98] at least and sometimes you're in the court?

A That's a fair statement sir.

Q Okay. You of course, as you testified today, are not speaking for any other residents of Ladue, just for yourself, aren't you?

A That's entirely correct.

Q Okay. And I think you said, that when you go home to your wife and your child and your dog, you really would like to avoid further controversy and debate, is that correct?

A That is generally correct, except at such times as I or my wife chose to initiate a discussion like, you know, who are you going to vote for in Tuesday election.

Q Uh-huh. Do you from time to time, discuss the Gulf problem, the Iraq problem, as to whether the United States will go to war there or whether peaceful means will be used and so forth?

A Yes sir.

Q I'm sorry.

A Yes sir.

Q Okay. And were any of those discussions initiated by looking out of the window and seeing this sign or were they independent of the sign?

A The,—it's kind of a hard question to answer. Some were initiated just by, you know, one of us happened to make a remark. Some of them, I have to tell you candidly, were [99] stimulated by this sign and by the newspaper publicity that has been attended upon it and these proceedings.

Q I see. And you'll agree, won't you, that the Iraqi conflict is a very important issue which people should discuss and consider, shouldn't they?

A I agree it is an important issue and I agree that concerned citizens will at some point in time, want to give some attention to it. If the import of the question is that they should be forced to do so, at times and places not of their own choosing, then I would disagree with it.

Q I see. Well this sign didn't force you to discuss that issue, did it?

A In and of itself, I mean, the sign didn't stand up and say "Talk to me", of course not.

Q Right.

A What the sign does, when you walk past it or these day, more likely drive past it, it forces the existence of that controversy into the forefront of your mind.

\* \* \* \*

## TESTIMONY OF SALLY HERMAN GULICK

[104]

SALLY HERMAN GULICK,  
DEFENDANT'S WITNESS, SWORN

## DIRECT EXAMINATION

BY MR. SUMMERVILLE:

Q Would you state your name for the record please?

A Sally Herman Gulick.

Q Do you go by the nickname Holly?

A Yes I do.

Q Okay. Ms. Gulick, where do you reside?

A #30 Willow Hill Road.

\* \* \* \*

[105] Q Let me show you ma'am, what's been marked as Defendant's Exhibit B, which is a certified copy of the Subdivision Indenture, as it appears in the records of the St. Louis County Recorder of Deeds and I'll ask you if you've seen that document?

A Yes.

Q Are you familiar with that document?

A I am.

Q Is that in fact, the indenture, which governs your subdivision, with private deed restrictions and covenants?

A Yes it is.

MR. SUMMERVILLE: Your Honor, we'd offer exhibit B, into evidence at this time.

THE COURT: Any objections?

MR. MARGO: No objections.

THE COURT: Exhibit B, is admitted.

MR. SUMMERVILLE: Thank you.

[106] BY MR. SUMMERVILLE:

Q Does exhibit B, set forth certain specific restrictions upon the use of private property in the Willow Hill Subdivision by the residents and owners of the property?

A Yes.

Q And does it give the trustees of the subdivision, with a proper majority of the owners of the lots, under the terms of the Indenture, the right to enact additional rules and regulations under the Indenture?

A Yes it does.

\* \* \* \*

[109] Q Ms. Gulick, you were asked about being a trustee of 114 Willow Hill and the Indenture, which I believe you still have in front of you?

[110] A Yes.

Q Would you agree, that the Indenture does not address political signs in any manner?

A That is true.

Q Now you just testified a few minutes ago, that if Ms. Gilleo approached you in several manners, you would be happy to discuss the Persian Gulf situation with her, is that correct.

A Yes.

Q You saw the sign up in her yard, didn't you?

A Uh-huh.

Q Did you ever go over and discuss the Persian Gulf with her?

A No, I never did.

Q Okay. Now I believe you testified that you don't want any signs in your neighborhood, isn't that correct? No matter what they say?

A That's correct.

Q Okay. But you didn't mind having a Santa Clause sign, in your neighborhood, at #5 Willow Hill, did you?

A In the last forty-eight hours, I have been doing a lot of thinking,—

Q Oh, so you've changed your mind since Monday now?

A I've changed my mind. I don't want "Beware Of The Dog", I don't want "Vote on Tuesday", I don't really care to have [111] any signs, including the Santa Claus.

Q Okay. So let me ask you, when I asked you on Monday, the question was, "So I am correct, that you're

willing to put up with an ugly For Sale sign, but not an ugly sign that states somebody's opinion?" You agree with me, you said "Correct" on Monday, but do you still agree with that?

A I think a For Sale and a For Rent sign, is a necessary evil, you are trying to sale [sic] your house.

Q So if you're trying to sale [sic] your house, it's okay to have a sign? If you're not trying to sale [sic] your house, it's not okay to have any sign at all now?

A I would say yes.

Q Okay. And am I correct, that although on Monday, you felt that a Santa Claus sign on the front of #5 Willow Hill was fine, today, you don't think it's fine?

A That's correct, because how you distinguish, that is a sign, so is "Beware Of The Dog", "No Trespassers Allowed", those are all signs and I don't care for them.

\* \* \* \*

#### TESTIMONY OF CALVIN FRANK DIERBERG

[114]

CALVIN FRANK DIERBERG,  
DEFENDANT'S WITNESS, SWORN

#### DIRECT EXAMINATION

BY MR. SUMMERVILLE:

Q Would you state your name for the record sir?  
[115] A Calvin Frank Dierberg.

Q Mr. Dierberg, are you the Chief of Police, in the City of Ladue?

A Yes I am.

Q How long have you had that position?

A About two years.

Q And what was your position with the City, immediately before that?

A I was a Lieutenant.

Q And how long had you been with the City of Ladue police force, continuously?

A Since 1955.

Q Alright. So you have been associated with the Police Department of the City of Ladue, since, continuously, since 1955?

A Yes sir.

Q Okay. Mr. Dierberg, as part of your responsibilities as the Chief of Police, are you responsible for the enforcement of the Sign Ordinance, of the City of Ladue, which is an issue in this case?

A I am.

Q And did you have responsibilities as a Police Officer, with respect to enforcement of that Sign Ordinance?

A I did.

Q Okay. During the thirty-five years that you have been [116] on the City Council, excuse me, Chief of Police of the City of Ladue, during that period of time that the Sign Ordinance in question, has been in effect, do you know of anytime when political signs of any kind, were permitted within the City of Ladue?

A I do not.

Q Okay. Have you personally been involved in removing political signs, when they appeared in the City of Ladue, —

A Yes I, —

Q —during your tenure?

A Yes I have.

Q Okay. And have you been involved in the removal of placards or signs of any kind, in residential neighborhoods, even though not of a political nature, in connection with your police responsibilities?

A If we've been directed so, yes.

Q Okay.

A It could be legal real estate signs, perhaps two, to a lot or a yard. It could be political signs.

Q Okay. Are you aware of anytime since you have been a police officer, enforcing the Ladue Sign Ordinance, where the Ladue Police have discriminated in anyway, in the enforcement of the Sign Ordinance, with respect to



political signs, on the basis of a content of the sign, the point of view expressed by the sign?

[117] A I have never known that to happen, —

Q Alright.

A —where the officer's made a decision of that nature. All such signs are removed.

Q Okay. (Pause) Let me show you Officer Dierberg or Chief Dierberg, excuse me, what's been marked as Exhibit E and I'll show you at the same time, what's been marked as Exhibit F. Can you explain to us please, what Exhibit E, is?

A E, is a dispatch, in which the sign classification refers to sign violation or ordinance violations, correction, sign violations, it's specific as to signs.

Q Okay. Is that a computer printout sir?

A Yes it is.

Q And is that kept in the ordinary course of the business of the Police Department?

A Yes it is.

Q Can you explain what period of time is reflected in Exhibit E?

A This one is from January 1, 1988 through 12/26/90.

Q So it's through today?

A Yes.

Q Alright. Now can you explain very briefly, what kind of information is contained in that document?

A This particular one is a sign violation, which is initiated by the Communications Officer. She gets the call, [118] she makes an entry into the computer as to a sign violation, a brief synopsis of what the violation is supposed to be, what time she dispatches, what time the officer arrives, what the officer's name is and if a report will be generated.

Q And does include any information about what the officer finds when he reached the scene and what he radios back to the dispatcher?

A It does at times, indicate that the situation was corrected.

Q Okay. Now does that document contain all of the police dispatches that relate specifically to the Sign Ordinance violations?

A Yes it does.

Q Alright. And are those entries made at or about the time of the occurrences that are reflected? That is, when the dispatch is made and when the information is obtained?

\* \* \* \*

[121] Q I'd like to ask you sir, based upon your thirty-five years of experience with the Ladue Police Department and your experience in enforcing the traffic laws and your experience in enforcing the ordinances and investigating accidents in the City of Ladue, whether you, as Chief Of Police, have any concern about the safety aspects of yard signs on private residences in the City of Ladue?

A I do.

Q And what are those safety concerns that you have?

A A motorist passing through that area or any subdivision, may glance off and see that sign and may tend to look at the sign longer than safety would permit and he could hit or loose control of his car and strike an object or a person or whatever. I would have that concern.

\* \* \* \*

[122] Q Chief, are you generally familiar with the Sign Ordinance and the sub-parts that we've been discussing today and during your deposition?

A Yes.

Q Okay. Would the ordinance prohibiting private signs on residential property, apply with equal force, to a sign in somebody's back yard?

A Yes it would.

Q So that if somebody placed a small sign in their back yard, near a cluster of let's say, poison ivy or poison oak and it said, "Watch Out For Poison Oak, Do Not Enter," that [123] would technically be in violation of the Ladue Ordinance, wouldn't it?

A Perhaps not, it may be a danger and serving notice of a danger, it might be one of the exceptions.

Q I see. And even though it's on private property, there is an exception?

A Perhaps.

Q I'll ask you if you will take a look if you will, at Section 35-2, of the Ladue Code, which is Exhibit 2, here and if you'll pardon me for reaching, I'll hand it to you and ask you if you will tell me where the exception to that poison ivy sign, that I mentioned, appears in Section 35-2, of Exhibit 2?

A Paragraph B, is what I was referring to. "subdivision identification signs of a permit character and road signs, for danger, direction or identification." Apparently I'm in err.

Q I see, you would consider the kind of sign I just described, to be a road sign?

A No.

Q Maybe I misunderstood, I'm sorry.

A I'm in err.

Q Oh, I'm sorry, I misunderstood.

A I'm in err.

Q Yes, now I know.

[124] A However, I think the letter of the ordinance may, under your Health Inspection Notices, may constitute notice of a hazard and I think that a reasonable person would believe that it would be permitted.

Q I see. Even though it technically then, isn't permitted by the ordinance, you see some flexibility by reasonable people, don't you?

A In that specific example, yes.

Q Okay. Let me give you another example. Again, somebody's large back yard, they're about to have a group of people over there and they have different punch bowls for drinks and one says "Alcoholic" and the other large sign, so non-drinkers will know it, says "Non-Alcoholic" and that's in someone's back yard. In violation or not in violation?

A Technically, it might be in violation.

Q Okay. Another party in someone's back yard and this time we have a merry-go-round and little types of things like that for children and there's a sign that says merry-go-round. Violation or non-violation?

A Technically, it is a violation.

Q I see. Do you see the same flexibility that might exist with respect to a merry-go-round sign, that you saw with respect to a poison ivy sign, that I've described?

A I would think they're comparable yes, the danger.

Q And would you anticipate that that homeowner in Ladue, [125] who wants to put up a merry-go-round sign or one of the others that I'm talking about, would go to the City Council and apply for a permit?

A He may.

Q Well, what would you anticipate, under those circumstances?

A I've never been faced with that question, I don't know.

Q Okay. Well, let me ask you, as Chief of Police, whose familiar with the ordinances and the safety of the people, if you were faced with that, one of those situations, how would you react?

A I think that would be like a sign over a pond that says, "Beware Of Thin Ice."

Q Okay. Would that type of a sign be permissible in someone's back yard, in your judgment?

A I think it would over-ride the safety measure.

Q Okay. Would that require the approval of the Ladue Council or not?

A Technically, it probably would.

Q Okay. And do you know of any section of the Ladue Ordinances, referred to as Exhibit 2, in this hearing, that permit that type of application?

A Not that I'm aware.

Q Alright. Have you, since your deposition or even before, have you made any effort to look at the sign, Exhibit 1, [126] to determine how long it would take

you to look at it, read it and then take your eyes away from it?

A No I haven't.

Q Okay. So when you testified that it would take somebody longer to look at Exhibit 1, as compared to looking at a road sign, that, or a stop sign, you're really guessing aren't you, on the relative difference of time it takes to look at such a sign, such signs?

A I don't think so. An average motorist, he sees the same type of traffic signs every time he drives out on the street. This particular sign he doesn't see that often and I think he would tend to read it as he's driving.

Q Okay. Would that also be true if the sign were up for two or three weeks and the same residents in the subdivision drove by it, back and forth, more than once? Wouldn't you agree; and I don't mean to ask you two questions at once, so I'll limit it to this question, wouldn't you agree, that after they see it the first or second time, that it would take considerably less time to look at it and understand it, the third or fourth time?

A I would think so.

Q Okay. So your real concern in this so-called "timing issue," is the first time or the second time that somebody sees the sign, is that correct?

A Yes.

[127] Q Is it the controversial nature of the sign, that would take somebody a little bit longer to look at it, than a road sign or is it the newness of the sign?

A It's probably both.

Q Alright.

A It's a new sign, it's normally not there, people want to see what it says.

Q Ladue has numerous ordinances to cover peace disturbance, trespass, thievery, maintaining the order, maintaining order, peace and order, don't they?

A Yes.

Q Okay. And you really don't have a serious problem in maintaining peace and order, in the City of Ladue,

if the plaintiff is permitted to put up this one sign, do you?

A This particular sign, it has generated apparently, some anonymous phone calls, of threatening and a harassing nature.

Q Uh-huh.

A Perhaps those calls would not have been received if the sign had not been and that's a guess.

Q Alright. Chief, does Ladue have an ordinance against harassing or anonymous phone calls to people?

A Yes it does.

Q Okay. When these anonymous phone calls that you refer to, were reported to you, tell me what steps the Police Department took to look into them and investigate them?

[128] A In anonymous or threatening phone calls, it's up to the telephone company to install a trap, which they call a Trap, on the line, to determine where the calls are coming from.

Q I see.

A The Police Department cannot request this from the telephone company, without a court order, so it's up to the individual phone owner, to make that request. Aside from that, Ms. Gilleo and I, discussed perhaps, if she left the home and while she was gone, to call us or before she left and we would keep an extra watch on her house.

Q I see. You did not consider it serious enough to seek a court order, did you?

A No.

Q Okay. And you didn't consider it serious enough to place extra patrolmen at her home, unless she called you and asked you to do so, isn't that correct?

A That's correct.

Q And you of course, have no opposition to heated, controversial debate, between citizens in Ladue, do you?

A Not as long as it's legal.

Q And peaceful?

\* \* \* \*



[133] Q For example, let me refer you to Exhibit E, at about the time of the election of this year, November 4, 1990 and November 5, 1990, November 6, 1990 and ask you whether those refer to the responses by the Police Department, to notifications of political signs in private yards?

A (No verbal response).

Q November 4, November 5 and November 6.

A Yes.

Q Okay. And to the best of your knowledge, were those signs removed, either by police or by the property owners on consultation of the police?

A Yes.

Q Take a look, if you would please, at the notation for 11/26/1990, can you tell me what kind of sign was involved in that notification?

A This was located at Ellsworth and McKnight Road. A resident complained of a sign advertising Winter Wonderland, being in view obstruction and the officer contacted the Park Ranger, who stated the sign would be moved, so there would be no obstruction.

\* \* \* \*

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

\_\_\_\_\_  
[Caption Omitted in Printing]  
\_\_\_\_\_

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND PERMANENT INJUNCTION**

Pursuant to Rule 56, Federal Rules of Civil Procedure, Plaintiff, Margaret P. Gilleo, through her attorneys, Green, Hoffman & Dankenbring, moves that this Court grant her summary judgment and enter a permanent injunction against enforcement of new Ladue City Ordinance Chapter 35.

Summary judgment should be granted where there is no genuine issue as to any material fact, and Plaintiff is entitled to judgment as a matter of law. The only facts material to Plaintiff's claims are those set forth herein and described more fully in the accompanying memorandum, and there is no genuine issue of fact as to any of these material facts. In particular, it is beyond dispute that the new Ladue ordinance does not differ in any relevant respect from the old ordinance previously held unconstitutional on its face by the Court. Consequently, as a matter of law, Plaintiff is entitled to summary judgment and issuance of the requested injunction.

In support of her motion, and as more fully described in the accompanying memorandum, Plaintiff states:

1. This action was brought by Plaintiff to enjoin enforcement of Chapter 35 of the Ladue City Ordinances. This ordinance purports to bar Plaintiff from placing in the front window of her home or in her front yard a

sign stating "FOR PEACE IN THE GULF." Plaintiff has challenged the ordinance on grounds that it infringes her Constitutional right to freedom of speech guaranteed by the First and Fourteenth Amendments to the Constitution.

2. Previously, the Court has found that Ladue's first ordinance, which purportedly banned political speech through signs (hereinafter "Old Chapter 35"), was unconstitutional on its face. The Court held that Old Chapter 35 impermissibly favored commercial speech over non-commercial speech and some forms of non-commercial speech over others. The Court entered a preliminary injunction barring enforcement of Old Chapter 35.

3. Following the Court's decision, Ladue repealed Old Chapter 35 and enacted a new ordinance (hereinafter "New Chapter 35") in its place. New Chapter 35 is, in all relevant aspects, substantially identical to Old Chapter 35: New Chapter 35, like its predecessor, purports to permit the posting of some signs, but not others, favoring commercial signs over those carrying non-commercial messages, and some forms of non-commercial signs over others. The differences between Old and New Chapter 35 do not affect the facial unconstitutionality of the ordinance.

4. New Chapter 35 purports to bar Plaintiff from placing in her window a sign stating "FOR PEACE IN THE GULF." Absent the entry of summary judgment or a permanent injunction, Plaintiff is again threatened with abridgment of her First Amendment rights. If New Chapter 35 is enforced against Plaintiff, she will suffer irreparable harm which will result in damages difficult, if not impossible, to measure.

WHEREFORE, Plaintiff moves that this Court grant her summary judgment; enter its Order prohibiting the City, its agents and representatives, from enforcing Ladue City Ordinance Chapter 35, Articles I and II; declare

such ordinance a violation of the First and Fourteenth Amendments to the Constitution; and award Plaintiff her costs and expenses of litigation, including reasonable attorneys' fees, and whatever other relief the Court deems just under the circumstances.

Respectfully submitted,

GREEN, HOFFMAN &  
DANKENBRING  
For the American Civil  
Liberties Union of Eastern  
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[Certificate of Service Omitted in Printing]

## Chapter 35

## SIGNS

## [CITY OF LADUE'S EXISTING SIGN ORDINANCE]

Art. I. Declaration of Findings, Policies, Interests, and Purposes

Art. II. In General, § 35-1—§ 35-24

ARTICLE I. DECARATION OF FINDINGS,  
POLICIES, INTERESTS,  
AND PURPOSES

WHEREAS the City of Ladue, formed in 1936, has a unique heritage and was created as a specially planned community based upon the work of the renowned city planner, Harland Bartholomew;

WHEREAS the City of Ladue is predominantly a residential community, small portions of which have been zoned for commercial and industrial use;

WHEREAS the City of Ladue consists of 5,456 acres or 8.566 square miles, of which a total of approximately 84% or 5,283 acres is in residential use (including 700 acres of public and private roads), approximately 13.9% or 721 acres is in public or semi-public use such as schools, public parks, and religious institutions, approximately 1% or 51 acres is in commercial use, and approximately 2% or 102 acres is in industrial use;

WHEREAS the protection and preservation of the rights and values of privacy, aesthetics, and safety are of great importance to the residents of the City of Ladue and substantially contribute to the special ambience, quality of life, and general welfare of the community;

WHEREAS the private, residential, commercial, industrial, and public areas of the City of Ladue should be

maintained in a manner to foster the values of privacy, aesthetics, and safety; and

WHEREAS the property values in the City of Ladue and the general welfare of its residents are enhanced by the maintenance of the highest standards of privacy, aesthetics, and safety for the benefit of all its residents;

IT IS HEREBY DECLARED that the erection and placement of signs should be carefully regulated so that the signs do not substantially impinge upon the privacy, aesthetic, and safety interests of the community;

IT IS HEREBY DECLARED that the proliferation of an unlimited number of signs in private, residential, commercial, industrial, and public areas of the City of Ladue would create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and commercial architecture, impair property values, substantially impinge upon the privacy and special ambience of the community, and may cause safety and traffic hazards to motorists, pedestrians, and children;

IT IS HEREBY DECLARED that the City of Ladue wishes to allow speech and expression through the medium of signs so long as the City of Ladue is protected against the proliferation of an unlimited number of signs that substantially impinge upon the City of Ladue's interests in privacy, aesthetics, and safety;

IT IS HEREBY DECLARED that the time, place, and manner of the regulation of signs described in this chapter are necessary to protect and preserve the City of Ladue's interests in privacy, aesthetics, safety, and property values;

IT IS HEREBY DECLARED that the residents of the City of Ladue have numerous alternative and effective ways of expressing themselves other than through the medium of signs;



IT IS HEREBY DECLARED that the City of Ladue takes notice of R.S.Mo. § 67.317 (1986), which requires political subdivisions of Missouri to allow "for sale" and "for lease" signs;

IT IS HEREBY DECLARED that there is a limited number of "for sale" and "for lease" signs in the City of Ladue at any given time;

IT IS HEREBY DECLARED that there is a limited number of commercial establishments in the commercial areas of the City of Ladue at any given time;

IT IS HEREBY DECLARED that there is a limited number of municipal signs, subdivision identification signs of a permanent character, road signs and driveway signs for danger, direction, or identification, health inspection signs, signs for churches, religious institutions, and schools, signs identifying public transportation stops, and signs identifying safety hazards in the City of Ladue at any given time;

IT IS HEREBY DECLARED that residence identification signs (i) assist emergency and safety personnel in providing fire, police, ambulance, and other emergency services to the public; and (ii) are small in size and are placed frequently on existing structures such as the mailbox or front wall of the principal structure. Therefore, residence identification signs contribute materially to the public safety and welfare and do not substantially impinge upon the City of Ladue's interest in privacy, aesthetics, and maintenance of property values so as to necessitate a total ban on said signs;

IT IS HEREBY DECLARED that road signs and driveway signs for danger, direction, or identification and signs identifying safety hazards contribute materially to the public safety and welfare and do not substantially impinge upon the City of Ladue's interest in privacy,

aesthetics, and maintenance of property values so as to necessitate a total ban on said signs;

IT IS HEREBY DECLARED that the allowance of all commercial and non-commercial signs in the residential, commercial, and industrial areas of the City of Ladue, other than those specifically permitted by this chapter, would permit the proliferation of signs in a manner that would substantially impinge upon the privacy, aesthetic and, to some extent, the safety interests of the City of Ladue and impair property values because of the unlimited number of signs that thereby could be erected throughout the City of Ladue;

IT IS HEREBY DECLARED that the signs permitted in this chapter either contribute substantially to the public safety and welfare or, because of their limited number, location, and size, do not substantially impinge upon the City of Ladue's interest in privacy, aesthetics, safety, and maintenance of property values so as to necessitate a total ban of all signs; and

IT IS HEREBY DECLARED that the City of Ladue opposes discrimination based upon the content of any lawful speech or expression and that the provisions of this chapter are not intended and shall not be interpreted so as to permit any such discrimination.

## ARTICLE II. IN GENERAL

### Sec. 35-1. Definitions.

For the purpose of this chapter, the following terms and words shall have the meanings respectively ascribed to them:

*Area of signs.* The entire area within a single continuous perimeter enclosing the extreme limits of such sign, except "wall signs." Such perimeter shall not include any border or structural elements lying outside and not form-

ing an integral part of the display. The area of a wall sign shall be the height of the tallest letter or display item multiplied by the length of the sign.

*Erect* shall mean to build, construct, attach, hang, place, suspend, or affix, and shall also include the painting of wall signs.

*Ground signs* shall include any sign supported by upright or braces placed upon the ground, and not attached to any building.

*Marquee.* Marquee shall include any hood or awning of permanent construction projecting from the wall of a building above an entrance and extending over a thoroughfare.

*Office building.* A building in which any of the occupants use the space occupied therein primarily for purposes of offices.

*Person* shall mean and include any person, firm, partnership, association, corporation, company, institution, and organization of any kind.

*Sign.* A name, word, letter, writing, identification, description, or illustration which is erected, placed upon, affixed to, painted or represented upon a building or structure, or any part thereof, or in any manner upon a parcel of land or lot, and which publicizes an object, product, place, activity, opinion, person, institution, organization or place of business, or which is used to advertise or promote the interests of any person. The word "sign" shall also include "banners", "pennants", "insignia", "bulletin boards", "ground signs", "billboards", "poster billboards", "illuminated signs", "projecting signs", temporary signs, "marquees", "roof signs", "yard signs", "electric signs", "wall signs", and "window signs", wherever placed out of doors in view of the general public or wherever placed indoors as a window sign.

*Wall Signs.* Any sign erected, painted on or constructed into and as a part of the wall or exterior of a structure and not extending out from or above the wall or exterior of such structure, but forming an integral part of the surface of such wall or exterior thereof provided that such sign may extend above the wall where there is a wall or roof structure behind all of such extension.

*Window signs.* Any sign erected, attached to the outside or inside of a window, or placed immediately inside of a window for public display purposes to persons on the outside of such building or structure. (Ord. No. 812, § 2, 1-21-63; Ord. No. 929, § 1, 10-16-67; Ord. No. 1387, § 1, 2-10-86)

#### Sec. 35-2. Signs restricted within the City.

No sign shall be erected, constructed, painted placed, enlarged, maintained, changed or relocated except in conformity with the provisions of this chapter.

#### Sec. 35-3. Removal of nonconforming signs.

Any sign which is not erected, constructed, or maintained in accordance with the provisions of this chapter may be removed by the City and the cost thereof charged to the owner of, or person maintaining, such sign. (Ord. No. 812, § 15, 1-21-63)

#### Sec. 35-4. Limited number and size of signs permitted.

Subject to the applicable regulations hereinafter described, the following types of signs are permitted in the City of Ladue:

- a) Municipal signs but said signs shall not be greater than nine (9) square feet.
- b) Subdivision and residence identification signs of permanent character but said subdivision identi-



fication signs shall not be greater than six (6) square feet and said residence identification signs shall not be greater than one (1) square foot.

- c) Road signs and driveway signs for danger, direction, or identification but said signs shall not be greater than twelve (12) square feet.
- d) Health inspection signs but said signs shall not be greater than two (2) square feet.
- e) Signs for churches, religious institutions, and schools subject to the restrictions described in Sec. 35-5.
- f) Identification signs for not-for-profit organizations not otherwise described herein but said signs shall not be greater than sixteen (16) square feet.
- g) Signs identifying the location of public transportation stops but said signs shall not be greater than three (3) square feet.
- h) Ground signs advertising the sale or rental of real property subject to the restrictions described in Sec. 35-10.
- i) Commercial signs in commercially zoned or industrial zoned districts subject to the restrictions as to size, location, and time of placement hereinafter described.
- j) Signs identifying safety hazards but said signs shall not be greater than twelve (12) square feet.

Sec. 35-5. Signs for churches, religious institutions, and schools.

Any church, religious institution, or school located in the city shall be permitted to erect one (1) identification sign and one (1) wall bulletin or one (1) ground sign, none of which shall be more than sixteen (16) square feet in area, when located on the premises occupied by

such church, religious institution, or school. Such sign shall be limited to announcements relating to the name of such church, religious institution, or school, its services, activities or other functions, and shall be located so that it does not interfere with a motor vehicle driver's view of the public roads or of the driveway leading into or out of such church, religious institution, or school premises.

In addition, a church, religious institution, or school may erect a temporary sign during a continuous period of not more than sixty (60) days, subject to the same limitations as to area and announcements. (Ord. No. 812, § 8, 1-21-63)

Sec. 35-6. Signs at filling stations.

In lieu of the signs authorized by other sections of this chapter, gasoline filling stations may erect one banjo type ground sign having an area of not more than twenty-five (25) square feet on each side (except where located on Lindbergh Boulevard, in which event such area shall not exceed sixty (60) square feet on each side) placed no closer to a street than the nearest edge of the road right-of-way, and having a ground clearance not less than twelve (12) feet at the bottom edge thereof, nor more than twenty-two (22) feet at the top edge thereof.

In addition, such filling stations may erect two (2) free standing signs of not more than twelve (12) square feet each, whose height aboveground at the top edge thereof shall not exceed four (4) feet; and three (3) building or window signs each having maximum dimensions of not more than two (2) feet in height, with a length not to exceed six (6) feet, and having a combined total area for the three (3) signs of not more than sixty (60) square feet; provided that where such filling station is located on a corner lot it may have four (4) such building or window signs. (Ord. No. 812, § 4, 1-21-63; Ord. No. 1197, § 1, 4-17-78)



Sec. 35-7. Signs for buildings other than filling stations, churches, religious institutions, and schools.

a) A building, other than gasoline filling station, church, religious institution, or school which is located on less than three (3) acres of ground and is occupied by a single separately owned and operated commercial or industrial establishment may have one sign attached to such building. Such sign shall be limited to twelve (12) square feet and shall not extend above the wall height of such building unless located on top of the building. In lieu of such sign, if the building is set back further than the front setback line for structures in the applicable zoning district, a free standing sign having an area of not more than fifty (50) square feet or one (1) percent of the ground floor area of such building, whichever is smaller, but not less than ten (10) square feet, may be erected on such building line.

b) A building located on three (3) acres or more of ground, which is occupied as set forth on paragraph a) of this section, and which covers not more than forty (40) per cent of the area of the tract of ground upon which it is located, may have a sign as provided in said paragraph a) with an area of not more than two hundred sixty (260) square feet; and where such sign is placed on a building located on Lindbergh Boulevard there is permitted in addition thereto a free standing sign having an area of not more than one hundred twenty-five (125) square feet, located anywhere within the property lines of the premises.

c) In addition to the signs permitted by paragraphs a) and b) of this section, such establishments may have one (1) window sign with an area of two (2) square feet for each ten (10) linear feet of window frontage on the street where displayed, but may have two (2) such signs in any event.

d) When such building is located on a lot bordered by two (2) or more streets, or at the intersection of a street and an area used by the public for vehicular traffic, the signs permitted by paragraphs a), b), and c) of this section shall be permitted on two (2) of such travelled areas. (Ord. No. 812, § 6, 1-21-63; Ord. No. 1197, § 1, 4-17-78)

Sec. 35-8. Signs for office buildings.

A building which is occupied to any extent as an office building or to any extent as an arcade building with business establishments not fronting on a public street may have the following signs; to wit:

- a) Each commercial and industrial establishment occupying any portion of the ground floor of such building and facing a public street may have the signs permitted by Sec. 35-9.
- b) The occupants using a portion of the building for offices and those occupants having business establishments not fronting on a public street may have one (1) sign for all such occupants giving only the name and address of the building, and the name and one business of each of such occupants. The area of such sign shall not exceed sixteen (16) square feet, and it shall be located on the wall of such building adjacent to the entrance thereto, or it may be a ground sign similarly limited as to area and content, located adjacent to or near the front property line of the premises. (Ord. No. 812, § 5, 1-21-63; Ord. No. 929, § 1, 10-16-67)

Sec. 35-9. Signs for buildings other than office or arcade.

a) A building other than an office or arcade building which is occupied by more than one industrial or commercial establishment, may have one (1) sign attached to such building for each such occupant facing a public

street. All such signs shall be limited to twelve (12) square feet and shall not exceed above the wall height of the building except when located on top of the building; and no sign shall extend out over either end of the building.

b) In addition to the sign permitted by paragraph a) of this section each of said separate business establishments may have the window signs that are authorized by paragraph c) of Sec. 35-7.

c) When the portion of the building occupied by such establishment is located on a corner of two (2) intersecting streets, or at the intersection of a street and an area used by the public for vehicular traffic, the signs permitted by paragraphs a) and b) of this section shall be permitted on each of such intersecting traveled areas. (Ord. No. 812, § 7, 1-21-63; Ord. No. 1197, § 1, 4-17-78)

#### Sec. 35-10. For sale and for lease signs.

It shall be permissible for the owner or authorized agent of an owner with an interest in real property to erect a single ground sign advertising the sale or rental of the real property upon which it is maintained; but such sign shall not be attached to any tree, fence or utility pole, and shall be not greater than six (6) square feet. Such sign may only state: (a) that the property is for sale, lease or exchange by the owner or his agent; (b) the owner's or agent's names; and (c) the owner's or agent's address or telephone number.

#### Sec. 35-11. Illuminated, moving, flashing, or animated signs.

No one shall install or maintain more than one illuminated sign among the signs permitted by this chapter, and no sign shall be illuminated otherwise than by electricity. All illuminated signs shall be constructed entirely of metal or other incombustible materials, except the insulation thereof, including the uprights, supports and

braces for the same, and if on a building shall be properly and firmly attached to the building and constructed so as not be or become dangerous. The illumination provided shall be limited to the minimum amount necessary to allow the text of the sign to be read. Such sign shall be illuminated only during the business hours of the sign user.

It shall be unlawful to install, construct, place, display, or continue to maintain any sign which is moving, flashing, or animated.

#### Sec. 35-12. Roof signs.

Every roof sign shall be constructed entirely of steel construction, including the upright supports and braces of the same, and must be so constructed as to withstand a wind pressure of not less than thirty (30) pounds to the square foot of area subject to such pressure. When a roof sign is erected on a building which is not constructed entirely of fireproof materials, the bearing plates of said sign shall bear directly upon the masonry, walls, or upon the steel girders which are supported on the masonry walls and intermediate columns of such building. All roof signs shall be thoroughly secured to the building upon which they are installed by iron or metal anchors, bolts, supports, chains, stranded cables, steel rods, or braces. (Ord. No. 812, § 11, 1-21-63)

#### Sec. 35-13. Free standing, ground signs.

No free standing or ground sign (other than banjo signs of gasoline filling stations) shall be at any point more than fifteen (15) feet above the ground level, and every such sign shall have an open space of not less than two (2) feet between the lower edge of such sign and the ground level. All ground signs shall be designated and constructed so as to be safe from falling and to withstand wind pressures of not less than thirty (30) pounds to the square foot of area subject to such pressure. (Ord. No. 812, § 12, 1-21-63)



#### Sec. 35-14. Permit Required.

No sign permitted under Sections 35-6, 35-7, 35-8, 35-9, 35-11 and 35-12 shall be erected, constructed, painted or placed upon any building or premises within the City until a permit therefor has been issued by the City Clerk. (Ord. No. 812, § 13, 1-21-63)

#### Sec. 35-15. Application.

No sign permit shall be issued until after an application therefor has been filed with the City Clerk accompanied by duplicate scale or dimensional drawings showing the plans and specifications, dimensions, the material of which said sign is to be constructed, the details of construction thereof, including loads, stresses, and anchorage, the estimated cost thereof, and in the case of ground signs the proposed location with reference to street lines and the walls of adjacent buildings, if any. When a proposed sign is to be attached to a building or other independent structure, the drawings shall show the position of the sign on the supporting structure, the method of attachment to such structure and the character of the structural member to which such attachment is made. It shall be the duty of the Building Commissioner to review said plans and specifications and make written report to the City Clerk within fifteen (15) business days after filing of a permit application, as to compliance with the provisions of this Section.

All applications for permits to erect signs shall be filed by the owner of the premises, or shall be accompanied by written consent of such owner, the lessee, or agent of the property upon which said sign is to be erected. (Ord. No. 812, § 13, 1-21-63)

#### Sec. 35-16. Issuance.

Within thirty (30) days after the filing of a permit application that conforms to the provisions of Section 35-15, the City Clerk shall issue a permit upon determining that the provisions of this Chapter have been complied

with, including approval by the Building Commissioner of the plans and specifications in compliance herewith. An application for a permit shall be deemed granted if the Building Commissioner does not file his report and the City Clerk does not issue a written denial within thirty (30) days after the filing of such permit application.

#### Sec. 35-17. Appeal upon denial.

Any person who believes that he has been improperly denied a permit for a sign that conforms to the requirements of this Chapter may appeal to the City Council for a permit. Within sixty (60) days after the filing of an appeal, the City Council shall issue a permit upon determining that all the provisions of this Chapter have been complied with. A permit shall be deemed granted if the City Council does not issue a written denial within sixty (60) days after the filing of such appeal.

#### Sec. 35-18. Prevention of corrosion.

All signs which are not galvanized or constructed of approved corrosion-resistive, noncombustible materials shall be painted whenever necessary to prevent corrosion. (Ord. No. 812, § 14, 1-21-63)

#### Sec. 35-19. Maintenance of premises near sign.

It shall be the duty and responsibility of the owner of, or person maintaining, a sign to maintain the immediate premises occupied by the sign in a clean, sanitary and healthful condition. (Ord. No. 812, § 14, 1-21-63)

#### Sec. 35-20. Inspection of signs.

All signs may be inspected by the Building Commissioner or someone appointed by him to determine if the sign is insecure, in danger of falling, or otherwise unsafe.

#### Sec. 35-21. Notice to remove unsafe sign.

When any sign becomes insecure, in danger of falling, or otherwise unsafe, or if any sign exists or is installed or



maintained in violation of the provisions of this chapter with respect to construction or safety, the owner, person or firm maintaining such sign shall correct the deficiencies or violation or remove the sign within ten (10) days after receiving notice from the City Clerk; provided, however, that if such sign constitutes an immediate danger to the public health, safety or welfare, the Building Commissioner shall order immediate correction or removal of such sign. (Ord. No. 812, § 14, 1-21-63)

**Sec. 35-22. Limited variation of chapter provisions.**

The City Council may grant a limited variation from the strict application of the provisions and requirements of this chapter, but such variation may only be granted as to the size or location of a sign or the number of signs permitted on a person's property, and only if the Council determines that the variation in the particular circumstance is consistent with the policies, interests, and purposes stated in Article I of this ordinance. When considering a request for a variation, the Council shall not consider the content of any sign, and shall not depart from the strict requirements of this chapter in any respect other than those specifically permitted by this section.

**Sec. 35-23. Application of existing signs.**

The provisions of this chapter shall apply to the erection, alteration, reconstruction, construction, and maintenance of all signs within the city; however, all existing signs that have previously been allowed by ordinance or approved by permit shall be permitted.

**Sec. 35-24. Severability of parts of this chapter.**

The sections, paragraphs, clauses, and phrases of this chapter are severable and if any phrase, clause, sentence, paragraph, or section of this chapter shall be declared unconstitutional or otherwise unlawful by the valid judgment, decree, or injunction order of a court of competent jurisdiction, such ruling shall not affect any of the remain-

ing phrases, clauses, sentences, paragraphs, and sections of this chapter. In the event that, contrary to the policies, interests, and values of the City of Ladue, a court of competent jurisdiction issues a judgment, decree, or injunction order that this chapter is unconstitutional or otherwise unlawful because of any omission or prohibition in this chapter, then all provisions of this chapter not specifically declared to be unconstitutional or otherwise unlawful shall remain in full force and effect and all signs not already specifically regulated in Sections 35-4 to 35-23 shall be permitted but shall not be greater than six (6) square feet. In the event that a judgment, decree, or injunction order declaring all or a portion of this chapter to be unconstitutional or otherwise unlawful is reversed or vacated by a court of competent jurisdiction, the provisions contained in this chapter shall remain in full force and effect.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

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[Caption Omitted in Printing]

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**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

COME NOW Defendants, the City of Ladue, et al., and pursuant to Fed. R. Civ. P. 56, move the Court to grant summary judgment in favor of Defendants. As grounds for their motion, Defendants state as follows:

1. This case raises the important constitutional question of the City of Ladue's right to preserve its long-standing and significant interests in privacy, aesthetics, safety, and maintenance of property values by regulating signs and billboards.
2. Plaintiff has alleged in her amended complaint that Chapter 35 of the City Code of the City of Ladue (hereinafter "Ladue") is unconstitutional under the First and Fourteenth Amendments of the United States Constitution.
3. Plaintiff maintains a sign which is not permitted under Chapter 35 of the Ladue City Code.
4. Defendants have filed an amended counterclaim seeking a declaratory judgment affirming the constitutionality of Chapter 35 of the Ladue City Code, as amended on February 25, 1991 (hereinafter "new Chapter 35" or "the ordinance").
5. Defendants' amended counterclaim seeks a declaration of the facial constitutionality of new Chapter 35 based upon the First and Fourteenth Amendments of the United States Constitution; the amended counterclaim also seeks a declaration of the constitutionality of said chapter

as applied by Defendants to prohibit the maintenance of Plaintiff's sign.

6. A copy of new Chapter 35 is marked as Exhibit A, attached hereto, and incorporated by reference herein.

7. Defendants desire to enforce new Chapter 35 as it applies to Plaintiff and her sign and to use all lawful means to enforce Plaintiff's compliance with said ordinance.

8. In order to expedite the final submission of the merits of this case, Defendants have agreed not to enforce new Chapter 35 only as it affects noncommercial speech and only until the disposition of the anticipated cross-motions for summary judgment; however, Defendants assert that new Chapter 35 is constitutional both facially and as applied to Plaintiff and her sign.

9. In support of their motion for summary judgment, Defendants incorporate their amended counterclaim by reference herein and file the following affidavits and record items:

- A. Affidavit (including attached exhibits) of Malcolm C. Drummond, marked as Exhibit B, attached hereto, and incorporated by reference herein. (Due to their bulk, the exhibits to the Drummond affidavit are being filed separately.).
- B. Affidavit (including attached exhibits) of the Honorable Edith J. Spink, Mayor of the City of Ladue, marked as Exhibit C, attached hereto, and incorporated by reference herein. (Due to their bulk, the exhibits to the Spink affidavit are being filed separately.).
- C. Portions of Plaintiff Margaret P. Gilleo's testimony at a preliminary injunction hearing held on December 26, 1990, concerning the validity of a predecessor ordinance to new Chapter 35; the transcript of this testimony is marked as

Exhibit D, attached hereto, and incorporated by reference herein.

10. Based upon the pleadings (including all attached exhibits), new Chapter 35 of the Ladue City Code, marked as Exhibit A, the Drummond and Spink affidavits marked as Exhibits B and C (including all attached exhibits), and the portions of Plaintiff's prior testimony on December 26, 1990, marked as Exhibit D, there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law.

11. The City of Ladue's new Chapter 35 complies with the First and Fourteenth Amendments of the United States Constitution for reasons that include the following:

- A. New Chapter 35 contains reasonable time, place, and manner regulations of speech expressed through the medium of signs; these regulations "are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample, alternative channels for communication of the information." *Ward v. Rock Against Racism*, 109 S.Ct. 2746, 2753 (1983) (quoting *Clark v. Community For Creative Non-Violence*, 104 S.Ct. 3065, 3069 (1984));
- B. New Chapter 35 is content-neutral because Ladue's purpose and justification in passing the ordinance is not related to the content of speech.
- C. Ladue's purpose and justification in passing new Chapter 35 includes the following significant governmental interests: the furtherance of the City's long-standing interests and policies in preserving and protecting privacy, aesthetics, safety, and property values.
- D. Privacy, aesthetics, safety, and maintenance of property values are compelling and significant

governmental interests; Ladue has the constitutional right to protect and preserve these interests through new Chapter 35 even though the ordinance may have an incidental effect on speech expressed through the medium of signs.

- E. New Chapter 35 prevents the proliferation of an unlimited number of signs in the City of Ladue, which would offend the City's interest in privacy, aesthetics, safety, and maintenance of property values.
- F. The signs permitted under new Chapter 35 indicate that the ordinance is narrowly tailored to allow as much speech as possible through the medium of signs without substantially impinging upon Ladue's interest in privacy, aesthetics, safety, and maintenance of property values.
- G. New Chapter 35 is narrowly tailored to achieve its content-neutral objectives, and the ordinance "promotes . . . substantial governmental interests that would be achieved less effectively absent the regulation." *Ward*, 109 S.Ct. at 2758 (quoting *United States v. Albertini*, 105 S.Ct. 2897, 2906 (1985)).
- H. Plaintiff Margaret P. Gilleo has numerous, ample, effective, and alternative forms of expression that do not significantly impinge upon Ladue's strong interests in privacy, aesthetics, safety, and maintenance of property values. These interests include:
  - 1) Letters, handbills, or flyers mailed to the residents of Willow Hill subdivision or to a broader audience;
  - 2) Letters, handbills, or flyers personally delivered to the residences in the Willow Hill subdivision or to a broader audience;



- 3) Person to person and/or door-to-door solicitation of neighbors in Willow Hill subdivision (or a broader audience) to support Plaintiff's position;
- 4) Telephone calls to her Willow Hill neighbors or to a broader audience to solicit support for Plaintiff's views;
- 5) Paid advertisements in newspapers of local circulation in the Willow Hill subdivision in Ladue and/or over a broader area including but not limited to the St. Louis Post Dispatch and the St. Louis Suburban Journal;
- 6) Use of a bumper sticker bearing a similar legend on Plaintiff's automobile;
- 7) Speaking at neighborhood meetings;
- 8) Inviting neighbors to tea or coffee or cocktails in Plaintiff's own home to discuss the issue of concern to her and to seek to persuade others to adopt her view;
- 9) Writing letters to the editor for newspapers and other periodicals in circulation in the City of Ladue and metropolitan St. Louis including, but not limited to, the St. Louis Post Dispatch and the St. Louis Suburban Journal;
- 10) Calling into radio talk shows in suburban St. Louis;
- 11) Making use of "public forum" commentary opportunities provided by television stations in the metropolitan St. Louis area; and
- 12) Arrangement for use of numerous public premises of county, city and school district or library district or of private premises of

schools and churches, located in Ladue, for a public meeting.

12. Defendants file contemporaneously herewith and incorporate by reference herein Suggestions in Support of Their Motion for Summary Judgment.

WHEREFORE, Defendants pray that this Court should grant summary judgment in favor of Defendants, declare that new Chapter 35 is constitutional and is consistent with the First and Fourteenth Amendments of the United States Constitution, deny Plaintiff's motion for summary judgment, dismiss Plaintiff's Complaint with prejudice, and assess costs against Plaintiff.

Respectfully submitted,

ARMSTRONG, TEASDALE, SCHLAFLY,  
DAVIS & DICUS

/s/ Jay A. Summerville  
JAY A. SUMMERVILLE  
JORDAN B. CHERRICK  
One Metropolitan Square, Suite 2600  
St. Louis, Missouri 63102  
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Attorneys for Defendants

[Certificate of Service omitted in printing]

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

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**AFFIDAVIT OF MALCOLM C. DRUMMOND**

Comes now Malcolm C. Drummond, being first duly sworn upon his oath, who deposes and says as follows:

1. My name is Malcolm C. Drummond; my residence address is 162 River Ridge Way, Folsom, California 95630; and my business address is Harland Bartholomew and Associates, Inc. (hereinafter "HBA") 2233 Watt Avenue, Suite 330, Sacramento, California, 95828;

2. I make this affidavit as to certain facts which are within my personal knowledge; I further make this affidavit as to certain expert opinions and conclusions which I hold and have reached based both upon my own personal knowledge and experience and upon certain facts and data made known to me which are of types reasonably and customarily relied upon by experts in the fields of urban planning, land use, subdivision regulation, architectural controls, and zoning, as more fully and specifically described herein;

3. I am a professional city planner and for many years have been professionally engaged as a planner, advisor, and consultant for municipal and other governmental authorities in the development, drafting and execution of comprehensive plans, zoning regulations, central business district plans, renewal and redevelopment programs, environmental plans, park and recreational plans, land planning projects, subdivision regulations, architec-

tural controls, and similar land use, development and planning matters;

4. In 1952 I received the Bachelor of Science in Urban Planning degree from Michigan State University;

5. Since 1974, I have been an adjunct professor at Michigan State University, in the Department of Urban Planning and Landscape Architecture; I have also been a visiting lecturer on various urban planning matters at the University of Missouri—Columbia, Washington University (St. Louis), Michigan State University, University of Minnesota at Duluth, and Southern Illinois University at Carbondale;

6. I am a member of the American Planning Association, the American Institute of Certified Planners, and the American Society of Landscape Architects;

7. I have been recognized as a qualified expert witness and have in fact given expert opinion testimony by deposition or at trial in at least 29 cases in numerous jurisdictions on zoning, land use, development, annexation, property value, subdivision regulation, architectural control and related matters;

8. A true and accurate comprehensive resume of my professional education, training, background, professional affiliations, representative publications, work experience, and expert testimonial experience is attached hereto and incorporated herein by reference as Exhibit A;

9. From 1959 until 1988 I was a permanent resident in the St. Louis, Missouri metropolitan area; from 1968 until 1988 I was continuously a resident of the City of Ladue (hereinafter "the City", or "Ladue"); from 1971 until 1988 I resided at 3 Lorenzo Lane in the Lorenzo Road subdivision (which adjoins the Willow Hill subdivision where the plaintiff in this case resides);

10. HBA has continuously represented Ladue as its principal consultant in planning, zoning and land use

matters since the City's incorporation in 1936; from 1970 until I left the St. Louis metropolitan area in 1988, I was personally responsible for providing zoning, land use and planning services to Ladue;

11. HBA continues actively to represent the City in its land use and planning needs, and although my personal responsibility for Ladue matters has diminished since my departure from the St. Louis area, I have continued to make myself personally available to the City for consultation as needed since that time;

12. During the time that I was principal planning consultant for Ladue, I was also actively engaged in providing planning services to numerous other municipalities throughout the St. Louis metropolitan area, the State of Missouri, and the Midwest;

13. In the immediate St. Louis metropolitan area, I have personally drafted zoning ordinances or substantial revisions of zoning ordinances for the Cities of Alton (Illinois), Berkeley, Ellisville, Ferguson, St. Ann, and Webster Groves; I have personally drafted comprehensive plans in the St. Louis area for Alton, (Illinois), Bridgeton, Crestwood, Des Peres, Ellisville, Ferguson, Florissant, St. Ann, Sunset Hills, Webster Groves, and Fenton; and, I have personally drafted central business district plans in the St. Louis area for Crestwood, Des Peres, Ferguson, Ladue, St. Ann, and St. Louis;

14. Each community I have represented has its own particular physical features, geography, history, socioeconomic mix and comprehensive view of its own planning and land use goals; as would be expected, there are very great differences among the different communities in such matters as the nature and appearance of existing building stock, the historic pattern of land use, the existing and desired mix of residential, public and semi-public, commercial and industrial uses, the appearance, aesthetic quality and harmony of its environment, and the degree

of the regulation it is willing to impose and accept in order to achieve and maintain its land use goals and its aesthetic, environmental quality and other community planning objectives;

15. Among the chief aims of proper city planning are the maintenance and improvement of community aesthetics, property values, safety, quality and harmony of environment, and quality of life through the implementation of land use, zoning and development regulations which express the city's overall concept of the type of community it is and/or wants to be;

16. Ladue has had a unique history of settlement and development which have left it with a heritage of low population and building density, almost exclusively residential usage, large planted and natural open spaces, streams and forests, uncluttered landscape, and harmonious and beautiful buildings;

17. In order for me properly to advise the City in planning matters, I considered it essential to inform myself as to its history and heritage since a familiarity with a community's historical development is fundamental to assisting it in defining, understanding and executing its comprehensive plan for the present and the future;

18. The land in Ladue was initially settled as a result of French and Spanish land grants before 1803, New Madrid Earthquake grants after the great earthquakes of 1811-1812, and Presidential land grants following the War of 1812 and was principally owned in parcels of large acreage;

19. The City has a rich inventory of buildings of special historical and/or architectural significance; that opinion is based upon my own personal knowledge and observation as well as upon certain treatises on the history and architecture of Ladue prepared under the auspices of the Missouri Department of Resources and St. Louis



County Department of Parks and Recreation, referred to in paragraphs 20 and 21 herein;

20. A true, accurate, and authoritative survey of buildings of historic and/or architectural note in the eastern portion of Ladue is contained in "Historic Buildings Survey, Eastern Ladue, Ladue, Missouri 1986", prepared by Esley Hamilton for the St. Louis County Department of Parks and Recreation under a grant from the Missouri Department of Natural Resources. A true and accurate copy of said Survey is attached hereto and incorporated herein by reference as Exhibit B;

21. A true, accurate, and authoritative survey of buildings of historic and/or architectural note in the central portion of Ladue is contained in "Historic Buildings Survey, Central Ladue, Missouri 1987", prepared by Esley Hamilton for the St. Louis County Department of Parks and Recreation under a grant from the Missouri Department of Natural Resources. A true and accurate copy of said survey is attached hereto and incorporated herein by reference as Exhibit C;

22. As reflected in the treatises authored by Esley Hamilton referred to above, Ladue has a number of well-maintained homes dating from its early pioneer years which preserve the special historic heritage of the area. A few representative examples of these are:

- A. *The Red Farm House*, 600 S. Warson Road. This farm house is a typical rural farm dwelling of the early 19th Century built by a German immigrant who was a carpenter and potato farmer.
- B. *Twin Springs Farm*, 1700 S. Warson Road. This Presidential land grant home was built in 1832 as two log cabins.
- C. *The Denny Home or "Plantation"*, 10041 Conway Road. This home was originally constructed

in 1829 on land granted by President Monroe in 1824, and it was expanded during the Civil War.

D. *The Station*, 10002 Litzsinger Road. This property was obtained through a Congressional New Madrid Earthquake certificate. The present dwelling was built in 1834 by a German immigrant, and it served as the site of Evangelical Lutheran worship services until the construction of the church which is now the Parkway United Church of Christ at Clayton and Ballas Road.

23. The present City of Ladue was founded in 1936 by merger of the pre-existing residential villages of McKnight, Deer Creek, and Ladue;

24. Each of the three pre-existing villages was a pioneer in the adoption of strict zoning and land use regulations, drafted, in each case by Harland Bartholomew, in the late 1920's and early 1930's to assure preservation of the spacious, residential quality of the area in its future development;

25. The zoning ordinances of Deer Creek, Ladue and McKnight villages contained average required minimum residential lot sizes significantly larger than those which have ever been the norm or average for communities generally, and this reflected the predominant land use pattern at the time the ordinances were adopted;

26. The three predecessor villages to Ladue were unique in that they were among the only municipalities in the State of Missouri other than the Cities of St. Louis, Kansas City, and Springfield which adopted zoning ordinances *before* rather than after the surge in population growth, homebuilding, and suburban expansion which followed the Second World War; because of this, and because much of the land annexed by Ladue since its incorporation has been unimproved at the time of annexation, Ladue has been able to regulate and harmonize

its postwar building and population growth consistently with an over-arching comprehensive zoning and aesthetics plan with little need to accommodate pre-existing non-conforming uses;

27. The City of Ladue was planned from its very creation to continue to be, and to develop as, principally a residential area building on the regulations and traditions of the three pre-existing villages;

28. The renowned city planner, Harland Bartholomew, the founder of HBA, was engaged by Ladue shortly after its incorporation in 1936 to prepare a Comprehensive City Plan to guide the City's development. A true and accurate copy of "A Preliminary Report Upon a City Plan, City of Ladue, Missouri", submitted by Mr. Bartholomew to the City Council of Ladue in March, 1939 and then adopted by the City, is attached hereto and incorporated herein by reference as Exhibit D;

29. A true and accurate published biographical resume of the late Mr. Bartholomew (who was a colleague and personal friend of mine for many years until his death), noting Mr. Bartholomew's many and varied accomplishments as of the publication date in 1952, is attached hereto and incorporated herein by reference as Exhibit E;

30. Ladue's Comprehensive City Plan is truly singular in that it was adopted very early in the City's existence, it has never been amended in its 52 years of use, and it is still in full force and effect today; this is highly unusual since, to my personal knowledge, most cities amend or revise their comprehensive plans at least every 10 to 15 years and I am not aware of any city which has adhered to a single, unamended, comprehensive plan as long as Ladue has done so;

31. Since the adoption of the Comprehensive City Plan in 1939, Ladue has been both consistent and unwavering in its implementation, and it has been both consistent and unwavering in disapproving any architectural,

aesthetic, zoning or land use changes which would out of keeping with the original vision set out by Harland Bartholomew;

32. Shortly after its incorporation, Ladue adopted an ordinance drafted by HBA which consolidated and codified the zoning districts and land use restrictions of the three predecessor villages;

33. A true and accurate copy of Ladue's zoning ordinance in its present form is attached hereto and incorporated herein by reference as Exhibit F;

34. A true and accurate copy of Ladue's zoning map in its present form is attached hereto and incorporated herein by reference as Exhibit G;

35. Ladue has permitted very few spot zoning changes and has not permitted any significant modification of its zoning districts and its zoning map has remained essentially unchanged for over 50 years (except, of course, for the addition of land annexed by the City); Ladue has granted hardship variances from minimum size, set back distance and similar requirements very rarely, and far less frequently than most other cities [sic];

36. Ladue has repeatedly and consistently denied attempts to decrease the restrictiveness of its residential zoning districts or to change residential zoning areas to commercial use;

37. For example, Ladue has consistently and successfully resisted all attempts to change any zoning on its Lindbergh Boulevard frontage from residential to commercial, even though Lindbergh Boulevard is a major commercial artery in metropolitan St. Louis and is zoned and used for commercial or mixed commercial and residential purposes in nearly every other St. Louis County community through which it passes;

38. Over many years, Ladue has demonstrated its willingness vigorously to defend its right to impose strict



zoning, subdivision, and architectural review regulations in conformity with its Comprehensive Plan and it has consistently prevailed in defeating all legal challenges: in *Flora Realty Investment Co. v. City of Ladue*, 246 S.W.2d 771 (Mo. banc 1952), the Missouri Supreme Court upheld the validity and reasonableness of Ladue's Comprehensive Plan as well as the validity of its 3-acre minimum lot single family residential zoning of a property owner's unimproved tract of more than 100 acres; in *Deacon v. City of Ladue*, 294 S.W.2d 616 (Mo. App. 1956), the Court of Appeals upheld Ladue's single-family residential 10,000 square foot minimum zoning of property which the owner believed should be commercial; in *Stoyarnoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970), the Missouri Supreme Court upheld Ladue's authority to create an architectural board with complete power to regulate architectural design and appearance for the purpose of promoting and maintaining general conformity the style and design of surrounding structures; in *Tealin Co. v. City of Ladue*, 541 S.W.2d 544 (Mo. banc 1976), the Missouri Supreme Court upheld the City's right to maintain single-family residential rather than commercial zoning on Lindbergh Boulevard (one of the major commercial arteries in St. Louis County); and in *Gerchen v. City of Ladue*, 784 S.W.2d 232 (Mo. App. 1989), the Missouri Court of Appeals rebuffed the attempt of another property to change the zoning classification of Lindbergh Boulevard property from single family residential to commercial.

39. Although population density in Ladue is very low, there are few large tracts of residential, and no large tracts of commercial or industrial land remaining to be developed in the City given existing zoning regulations;

40. Ladue has strictly controlled the type of commercial businesses which have developed in its limited commercial areas through zoning regulations and special use permit requirements; as a result, except for two supermarkets and four gasoline filling stations, Ladue's com-

mercial establishments are almost exclusively small walk-in retail, restaurant, and banking businesses with less than 15,000 square feet; this is extremely unusual for a city of Ladue's size and population;

41. Since its inception, Ladue has made extraordinary and consistent efforts to preserve and enhance the aesthetic quality of its environment; to my personal observaton, Ladue has made more sustained and consistent efforts in this regard than any other municipality which I have professionally advised, or with which I have been professionally associated, bar none;

42. For example, for reasons of aesthetics, privacy, environmental harmony and visual quality Ladue, to my personal knowledge, has never allowed such common accessory uses of property as the following: unscreened parking of recreational vehicles or boats; outside storage of building materials; unscreened parking of commercial trucks; outside parking of vehicles being repaired; or visible satellite dishes;

43. Further, for the same reasons, Ladue has never permitted such common zoning uses as apartment buildings, duplexes, condominiums, hotels, motels, rooming houses, or parking garages;

44. In the interests of aesthetic and visual harmony, the City has carefully regulated all architectural changes since its earliest years; an Architectural Review Board was first established in 1940, and all applications for building permits affecting the outward appearance of buildings either already constructed or to be constructed must be reviewed by this Board before being approved by the Building Commissioner;

45. Unlike most of its neighboring suburban communities (including the adjacent county seat of Clayton), Ladue places strict limits on the height of buildings; in the interests of aesthetic harmony, no building (including an office building) can exceed 2½ stories; there is



only one building in Ladue which exceeds that limit (three stories, by virtue of a special use permit);

46. As I mentioned above, Ladue is—by choice—predominantly a residential community, very small portions of which have been zoned for commercial and industrial use;

47. Ladue consists of 5,456 acres or 8.566 square miles, of which a total of approximately 84% or 5,283 acres is in residential use (including 700 acres of public and private roads), approximately 13.9% or 721 acres is in public or semi-public use such as schools, public parks, and religious institutions, approximately 1% or 51 acres is in commercial use, and approximately 2% or 102 acres is in industrial use;

48. A true and accurate color-coded map of the City of Ladue showing the areas which are zoned residential, commercial and industrial is attached hereto and incorporated herein by reference as Exhibit H;

49. Ladue's land use pattern is extremely atypical of cities generally, but it is completely consistent with Ladue's history, its Comprehensive Plan, and its desire to maintain an open, rural residential community of uncluttered appearance; according to land use statistics compiled and maintained by HBA for the St. Louis County cities of Ballwin, Creve Coeur, Des Peres, Ellisville, Frontenac, Manchester, and Town & County, those cities have the following average land use ratios: residential 58.1%; public and semi-public 11.3%; commercial 8.5%; and industrial 1.3%;

50. Ladue is a community of larger than average residential lots, extensive landscaping with plant materials and large public, semi-public, and private open spaces;

51. Ladue's zoning provides for much greater than average set-back requirements from lot boundaries;

52. Ladue is one of only a handful of communities in the United States with zoning districts for 3 acre residential lots;

53. Ladue is unique in the high percentage of its area which is zoned for the much larger than average 3 acre or 1.8 acre lot sizes; 17.6% of Ladue's total land is zoned for 3 acre residential usage and 41.1% is zoned for 1.8 acre residential usage; more than 75% of all of the land in Ladue is zoned for single family usage with minimum residential lot sizes of three quarters ( $\frac{3}{4}$ ) acre (30,000 square feet) or greater;

54. To my knowledge many homes in Ladue are on lots which exceed the minimum requirements of their zoning districts;

55. Although approximately 84% of Ladue's land is zoned for residential use, residential structures actually cover less than 5% of the land in Ladue, due to Ladue's historic pattern of development and its zoning favoring larger than average residential lot sizes and single-family usage; this is an extremely low building density and is one of the principal reasons for Ladue's spacious, open, rustic and uncluttered appearance;

56. The large lot sizes and low building density have allowed for the maintenance of large areas of plant materials, woods, streams and open areas which make Ladue unique in the Midwest; I have done professional work for such midwestern cities as Indianapolis, Detroit, Cleveland, Chicago, Minneapolis, Omaha, Kansas City, Memphis, Dallas and Houston and, while each has lovely residential suburbs, in my opinion none has any suburb which can compare with Ladue in its aesthetic ambience and privacy or in the charm and visual quality it has been able to maintain through preservation of its low density, rustic, heavily-wooded, uncluttered and open appearance;

57. Ladue is distinctive in that it is virtually the only St. Louis suburb which has left its natural drainage ways in their natural state; most of Black Creek (at least two miles) and nearly all of Deer Creek and its tributaries (at least ten miles) have been left in their natural condition; almost without exception, other St. Louis and midwestern suburbs have boxed and channelized their streams, often underground, to accommodate development; Ladue's natural streams and woods greatly enhance the aesthetic impression of a rustic, natural, open and uncluttered residential community;

58. Ladue is very unusual in that, to my knowledge, in fewer than six of the City's approximately 102 residential subdivisions were most of the homes built by a single developer/builder; for this reason Ladue's residential areas have a much greater than average charm and aesthetic appeal and they have largely avoided the subdivision tract appearance of many modern suburbs;

59. Except for a small percentage of Ladue's homes which are located on Litzinger Road, Warson Road, McKnight Road, Lay Road, Clayton Road, Ladue Road, Price Road, Old Warson Road, Des Peres Road and Lindbergh Boulevard, the homes in Ladue are contained within private subdivisions, with deed covenants and restrictions administered by subdivision trustees restricting the use of private property within the subdivisions;

60. While many suburban communities have residential subdivisions with indenture restrictions as Ladue does, Ladue is the only city I know where virtually all subdivision streets are privately rather than publicly owned and maintained;

61. 207 of Ladue's 210 subdivision streets and lanes are privately owned and maintained by subdivision trustees; by tradition and trustee decisions, these streets—while rustic, charming and private—typically are extremely narrow (typically 16, 18 or 20 feet), lack curbs

or gutters, lack on-street parking space, lack adjacent sidewalks, and are partially obstructed by moveable obstacles known as "horses" to slow traffic; they are typically undulating and winding;

62. A very good example of Ladue's fidelity to its original Comprehensive Plan is the fact that the City's zoning map and its zoning districts are essentially the same today as they were when the city was created (except for the addition of annexed land)—such changes as have been made have been minor and essentially insignificant;

63. Ladue's zoning and land use regulations and its unswerving fidelity to Harland Bartholomew's original plan have been highly successful in achieving the quality of environment, aesthetic excellence, and property values which are the aim of the Comprehensive Plan;

64. In 1974, the City engaged HBA to prepare a study and report on the effectiveness of the original Comprehensive Plan and original comprehensive zoning ordinance after their first 35 years of existence; the basic conclusion of the 1974 study, which I personally prepared, was that the City's Comprehensive Plan was working very well and needed no amendment. A true and accurate copy of my study, "A Preliminary Report Upon the Comprehensive Plan, City of Ladue, Missouri, April, 1974," is attached hereto and incorporated herein by reference as Exhibit I;

65. Ladue has made a major effort during the last fifteen years to improve the aesthetics, beauty and physical harmony of the City's principal commercial area on both sides of Clayton Road from Conway Road westwardly to the Highway 40 overpass (now known as "The Special Business District"), as well as the small commercial areas at the intersection of Lindbergh and Clayton Road, the intersection of Clayton Road and Price Road,

on Ladue Road and the small industrial area near Hunter Avenue and Highway 170;

66. In 1983, after many years of planning, the City created the Special Business District consisting of the City's principal commercial area on Clayton Road between Conway and Highway 40; by means of City appropriations and special assessments the City was able to accomplish the following:

- a) Repavement of the road;
- b) Improvement of sewer and water drainage;
- c) Installation of new and aesthetically attractive traffic signals;
- d) Removal of all overhead telephone poles and wires and electric poles and wires from the street scape;
- e) Planting of trees and shrubs and the placement of flower tubs on both sides of the street;
- f) Construction of sidewalk on the north side of Clayton Road.

67. The aesthetics and appearance of the Special Business District were carefully planned and executed by the City in consultation with property owners and with HBA which, under my direction, prepared a detailed study and recommendation dated June 24, 1982, a true and accurate copy of which is attached hereto and incorporated herein by reference as Exhibit J;

68. A true and accurate copy of the color rendering of the 1982-1983 Special Business District Improvements prepared by HBA is attached hereto and incorporated herein by reference as Exhibit K;

69. A true and accurate copy of the blueprint for the 1982-1983 Special Business District Improvement pre-

pared by HBA is attached hereto and incorporated herein by reference as Exhibit L;

70. The aesthetic upgrading and improvement of the Special Business district were quite dramatic;

71. True and accurate photographs of the appearance of the Special Business District before the improvements made in 1982-1983 are attached hereto and incorporated herein by reference as Exhibits M through P;

72. True and accurate photographs of the appearance of the Special Business District after the improvements made in 1982-1983 are attached hereto and incorporated by reference as Exhibits Q through T;

73. As a result of the aesthetic improvements made by Ladue in connection with the Special Business District improvements, Ladue received the Governor's Town Tree-scape Award in 1984 from Governor Christopher Bond. A true and accurate copy of the Award is attached hereto and incorporated herein by reference as Exhibit U;

74. The intense public interest in maintaining exceptionally high aesthetic and environmental standards is demonstrated by long standing and continuous efforts by both the City and private organizations to upgrade, improve and beautify all areas visible to the public;

75. As Ladue's Planning consultant and as a long-time former resident I am familiar with the City's Civic Improvement Committee, which was created in the late 1940's and has remained in continuous active existence ever since, to foster aesthetic improvement of all public and semi-public areas of the City; this group facilitates and oversees the careful planning, planting, care and maintenance of trees, shrubs and flowers in public and semi-public areas;

76. The extent and the success of the beautification efforts of the City, the Civic Improvement Committee and other local organizations in Ladue have been outstanding and unique in my experience; to my personal knowledge,



these projects extend to the careful planting, maintenance and care of flowers, trees and shrubs in all public and semi-public areas, both commercial and non-commercial, and they even extend to the landscaping, planting and care of many state highway under-passes and access and entry ramps in the City;

77. As a city planner, I hold the firm opinion that the location, existence and design of signage in a community directly affect the visual and aesthetic appeal, and that the careful regulation of signage is an essential element of city planning;

78. I also hold the opinion that most types of temporary signs and some types of permanent signs, whether on private property or on public easements or in the public right-of-way, create a special risk of visual blight through proliferation because there are no natural limitations on their number or duration;

79. I am personally aware that many interest groups, lobbying groups, political organizations and other associations and groups distribute signs and placards in volume from time to time for display in the St. Louis metropolitan area, both in private yards and in public areas and the public rights-of-way;

80. I am also personally aware that many St. Louis suburban communities that do not restrict such signs experience unsightly proliferation of temporary or permanent signs constructed by residents or merchants themselves for many purposes;

81. Based upon my personal knowledge and experience, many municipalities in St. Louis County which do not strictly limit the erection of signs frequently experience a proliferation of yard signs and placards and temporary and permanent signs in the public rights-of-way; this is true especially in the campaigns before municipal, primary, or general elections but such proliferation can and often does

occur at other times as well; I have observed such proliferation in Ferguson, Webster Groves, St. Ann, Berkeley, Manchester and Ellisville, which are all cities in the St. Louis metropolitan area which I have served as a Planner;

82. It is a basic and accepted principle of urban planning, and a principle which I hold to be fundamental, that a proliferation of signs causes visual blight;

83. It is also my opinion that signs and billboards naturally cause visual blight as well as impinge on privacy because those who see them are a "captive audience";

84. I was very actively involved in assisting communities to draft ordinance excluding billboards from residential areas to prevent visual blight;

85. It is my considered professional opinion that an impairment of the aesthetic quality of a City such as Ladue negatively affects property values;

86. A proliferation of signs in a commercial area degrades the overall aesthetic quality of the area and of the community as a whole; a proliferation of signs in a residential area degrades the aesthetic quality and the "curb appeal" of the homes in the area and has a direct negative bearing on the length of time it takes to sell a home and the price which the home will command;

87. It is also my opinion based on my education, training, experience and professional study, that a proliferation of signs in any particular area may cause a safety hazard by distracting the attention of drivers; that this view is widely accepted as valid is reflected in *Street Graphics and the Law*, Daniel R. Mandelker and William R. Ewald, American Planning Association, 1971 (revised printing copyright 1988), a treatise which I regard as authoritative;

88. It is a widely accepted guideline of city planning that a proliferation of signage in commercial areas mixed

with uncontrolled access to commercial thoroughfares creates a dangerous potential for accidents;

89. In the St. Louis area, for example, the commercial area along Clayton Road in Ladue is much safer for drivers, in my opinion, than either the commercial strips of Manchester Avenue or Olive Street Road extending from the City of St. Louis to Interstate 270, in large part because Ladue severely limits both commercial and non-commercial signage on Clayton Road, and the cities along Manchester Road and Olive Street Road do not impose severe sign restrictions—resulting in distracting clutter;

90. Ladue is virtually the only city of which I am aware where nearly 100% of the residential streets are privately rather than publicly owned, and which by design are unusually narrow, largely winding, and undulating, have no curbs or gutters, have no room for on street parking, and have no sidewalks; in my opinion, this widespread condition may cause a much greater traffic hazard arising from a proliferation of yard signs that would be the case in communities which have conventional residential streets;

91. Ladue has strictly limited signage in its city limits in the interests of aesthetics, privacy, maintenance of property values, and safety since it was incorporated;

92. From the earliest days of the three predecessor villages to Ladue until the late 1950's, Ladue had strict signage restrictions and prohibitions incorporated in the applicable zoning ordinances themselves; true and accurate copies of those zoning ordinances are attached hereto and incorporated herein by reference as Exhibits V through Z;

93. Beginning in 1959, owing in large part to the need to regulate commercial signage more comprehensively, the sign restrictions of Ladue—and those of many other communities—became more complex and lengthy than had previously been the case; because of this, Ladue, like many

other cities, separated its signage restrictions from its zoning code and set them apart in a separate ordinance and City Code Section; true and accurate copies of Ladue's sign ordinances and their amendments from 1959 through the present time are attached hereto and incorporated herein by reference as Exhibits AA through JJ;

94. I have had an opportunity to read and analyze Ladue's new sign ordinance adopted on January 21, 1991, with the minor amendments proposed to be adopted by the City Council on February 25, 1991, and it is my opinion that this ordinance prevents a proliferation of signs by disallowing all signs not naturally limited in number, except those signs which are directly related to promoting the public safety (such as house numbers and home identification signs, small in size, which promote the City's interests in efficient police and fire protection);

95. It is my opinion, based on my education, training, background, and professional experience that the exceptions permitted under Ladue's new sign ordinance of January 21, 1991, (as proposed to be amended on February 25, 1991) all either contribute materially to the public safety and welfare, or, because of their limited number, location and size, do not substantially impinge upon the City's interests in privacy, aesthetics, safety, and maintenance of property values;

96. It is further my opinion, based on my long professional experience as planning consultant to the City of Ladue that the policies, interests and purposes stated in Article I of the Ladue's new sign ordinance of January 25, 1991, (as proposed to be amended on February 25, 1991) are fully consistent with principles and policies which have guided the City in its land use, zoning and planning decisions during the 55 years HBA has represented it;

97. In my opinion, the new sign ordinance is completely consistent with and rationally promotes the City's interests in aesthetic excellence, privacy, maintenance of

property values and safety, which have been the City's guiding zoning, land use and sign regulatory principles over the 55 years that HBA has represented it;

98. As a long-time resident of Ladue, and as the City's long-time planner, I am personally aware that plaintiff has at least the following ample and effective alternative forms of expression actually available to her for the expression of the message she desires to convey on her sign, each of which would be fully consistent with Ladue's zoning, land use, and sign ordinances and not inconsistent with Ladue's strong interests in aesthetics, privacy, maintenance of property values, and safety:

- A. Letters, handbills, or flyers mailed to the residents of Willow Hill subdivision or to a broader audience;
- B. Letters, handbills, or flyers personally delivered to the residences in the Willow Hill subdivision or to a broader audience;
- C. Person-to-person and/or door-to-door solicitation of neighbors in Willow Hill subdivision (or a broader audience) to support plaintiff's position;
- D. Telephone calls to her Willow Hill neighbors or to a broader audience to solicit support for plaintiff's views;
- E. Paid advertisements in newspapers of local circulation in Willow Hill subdivision in Ladue and/or over a broader area including but not limited to the St. Louis Dispatch and the St. Louis Suburban Journal;
- F. Use of a bumper sticker bearing a similar legend on plaintiff's automobile;
- G. Speaking at neighborhood meetings;
- H. Inviting neighbors to tea or coffee or cocktails in plaintiff's own home to discuss the issue of

concern to her and to seek to persuade others to adopt her view;

- I. Writing letters to the editor for newspapers and other periodicals in circulation in the City of Ladue and metropolitan St. Louis including, but not limited to, the St. Louis Post Dispatch and the St. Louis Suburban Journal;
- J. Calling into radio talk shows in suburban St. Louis sponsored by several local radio station;
- K. Making use of "public forum" commentary opportunities provided by most of all of the television stations in the metropolitan St. Louis area including the local affiliates of each of the three national commercial networks, the local affiliate of the Public Broadcasting System, and two local independent stations;
- L. Arrangement for use of numerous public premises of county, city and school district or library district, or of numerous private premises of schools and churches, located in Ladue, for a public meeting.

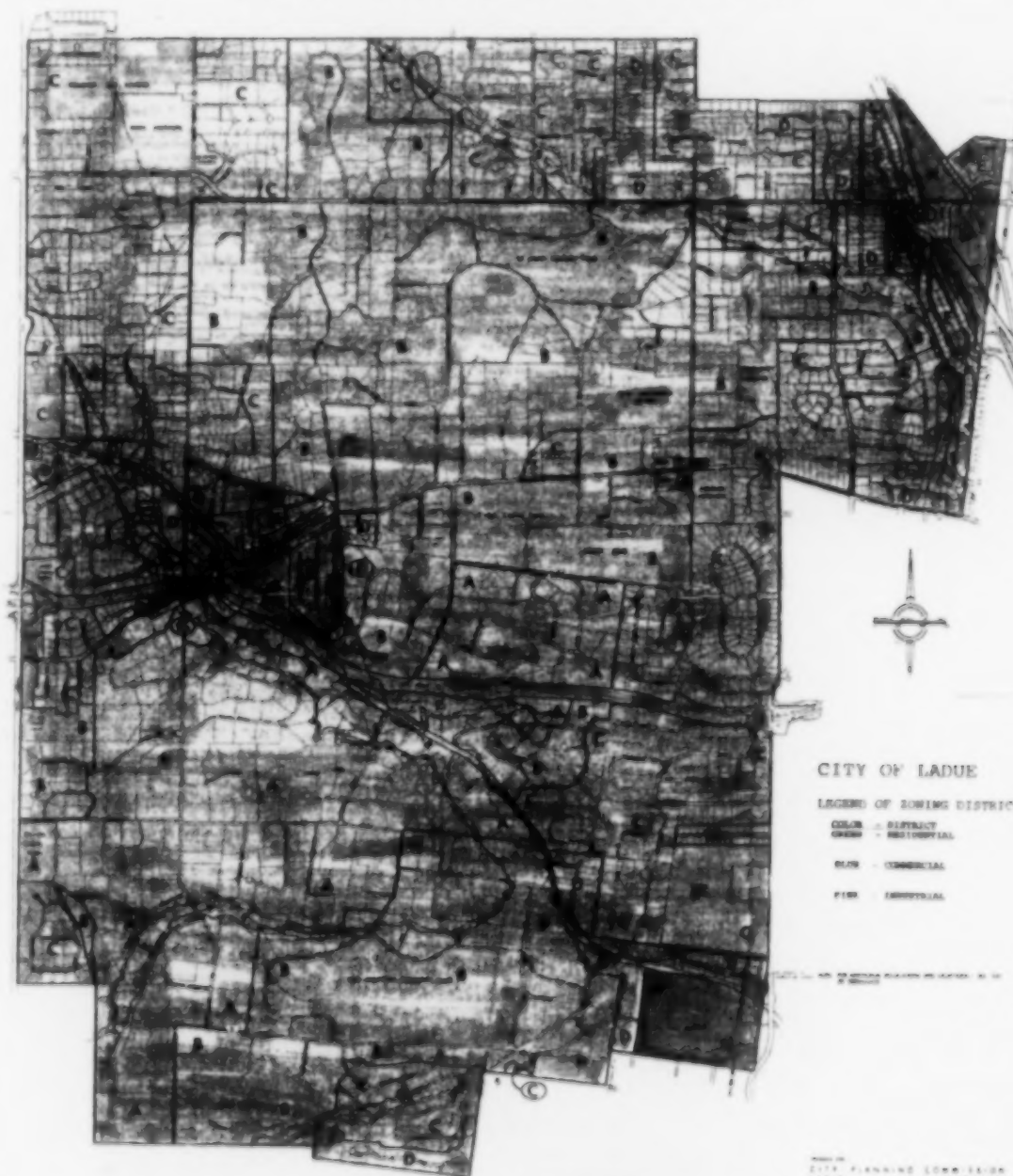
/s/ Malcolm C. Drummond  
MALCOLM C. DRUMMOND

[Notarization Omitted in Printing]



# CITY OF LADUE

## SAINT LOUIS COUNTY, MISSOURI



### CITY OF LADUE

#### LEGEND OF ZONING DISTRICTS

GREEN - RESIDENTIAL  
 BLUE - COMMERCIAL  
 PINK - INDUSTRIAL

EXHIBIT

DRUMMOND II

PREPARED BY  
 CITY PLANNING COMMISSION  
 LADUE, MISSOURI  
 DATED: SEPTEMBER 1, 1964

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
— EASTERN DIVISION

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[Caption Omitted in Printing]

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AFFIDAVIT OF EDITH J. SPINK

COMES NOW Edith J. Spink, being first duly sworn upon her oath, who deposes and says as follows:

1. My name is Edith J. Spink and since 1967 I have resided at 9 Log Cabin Drive, Ladue, Missouri;

2. I make this affidavit based upon my personal knowledge of the facts, circumstances and occurrences to which it relates;

3. I have read the Affidavit of Ladue's longtime City Planner, Malcolm Drummond, filed herein, and I have provided Mr. Drummond with true and accurate copies of numerous documents from the archives and regular business records of the City of Ladue for use in his Affidavit, as more fully described herein;

4. I was elected Mayor of the City of Ladue (hereinafter referred to as "The City" or "Ladue") in 1975 and I have served continuously in that office since then;

5. Prior to my election as Mayor, I served for 5 years, from 1970 until 1975, as an elected member of the Ladue Board of Alderman/City Council (hereinafter referred to as "City Council"); during the last three years of that City Council service I was the Acting President of the City Council;

6. I was educated at Mary Institute in Ladue, which I attended for eight years, and at Washington University,

from which I received the Bachelor of Laws degree in 1945 and the Bachelor of Arts degree in 1946;

7. In 1945, I was admitted to the Missouri Bar; while I have never engaged in the active private practice of law, I was honored to receive the the Distinguished Law Alumni Award from the Washington University School of Law in 1988;

8. Ladue is a residential community in suburban St. Louis County with a population of 8,847;

9. Classified as a city of the fourth class, Ladue is organized under Chapter 79 of the Revised Statutes of Missouri, and it is governed by that Chapter and other statutory provisions regulating governance of cities of the fourth class;

10. Ladue's City Council consists of six elected councilmen/aldermen, two from each of the City's three wards;

11. As Mayor, I have the privilege of sitting in, and presiding over, City Council meetings, but I am not permitted to vote on any matter pending before the Council except in case of a tie (Section 79.120 R.S. Mo. 1986);

12. No Ladue ordinance can become effective without concurring affirmative votes of at least four (4) of the six (6) elected Council members (Section 79.130 R.S. Mo. 1986);

13. When any ordinance is passed by the City Council, the Mayor has the duty either to sign the ordinance, in which case it takes effect according to its terms, or to veto the measure and return it to the Council for reconsideration; upon reconsideration, the ordinance becomes effective in spite of the Mayor's veto upon the affirmative vote of at least four Councilmen (Section 79.140 R.S. Mo. 1986);

14. I have lived throughout my entire lifetime in the St. Louis metropolitan area; before moving to Ladue I

resided for many years in the City of St. Louis, as well as in University City and Clayton;

15. While I was living in other parts of the metropolitan area, I was personally very familiar with Ladue since I had attended school there for eight (8) years, and I had many occasions to visit close relatives and friends who were long-time residents;

16. My husband and I chose to move to Ladue in 1967 because we believed that its high aesthetic standards, the high value it placed on maintaining a spacious, country-like, beautiful, and uncluttered appearance in its residential and commercial areas, and the importance it accorded to both privacy and environmental harmony, made it uniquely appealing as a residential community in this area;

17. My two decades of elected public service in Ladue have been principally spent in an ongoing effort on my part to encourage, foster and enhance the distinctive qualities of aesthetic excellence, privacy and environmental harmony which drew me to Ladue in the first place;

18. Ladue has had a unique history of settlement and development which have left it with a heritage of low population and building density, almost entirely residential usage, large planted and natural open spaces, streams and forests, uncluttered landscape, and harmonious and beautiful buildings;

19. After moving to Ladue, I became aware of the widely-known historical facts that the land in the City was initially settled as a result of French and Spanish land grants before 1803, New Madrid Earthquake grants after the great earthquakes of 1811-1812, and Presidential land grants following the War of 1812 and that it was principally owned in parcels of large acreage;

20. Based on my personal knowledge and observations, the City has a rich inventory of buildings of special historical and/or architectural significance;



21. Eastern Ladue was the subject of an authoritative survey of buildings of historic and/or architectural note entitled "Historic Buildings Survey, Eastern Ladue, Ladue, Missouri 1986", prepared by Esley Hamilton for the St. Louis County Department of Parks and Recreation under a grant from the Missouri Department of Natural Resources. A true and accurate copy of that document is attached to, and incorporated in, The Affidavit of Malcolm C. Drummond as Drummond Aff. Ex. B;

22. Central Ladue was the subject of another authoritative survey of buildings of historic and/or architectural note contained in "Historic Buildings Survey, Central Ladue, Missouri 1987", also prepared by Mr. Hamilton for the St. Louis County Department of Parks and Recreation under a grant from the Missouri Department of Natural Resources. A true and accurate copy of that survey is attached, and incorporated in the Affidavit of Malcolm C. Drummond as Drummond Aff. Ex. C;

23. To my personal knowledge, Ladue has many well-maintained historic homes dating from its early pioneer years which preserve the special heritage of the area. Some representative examples of these are:

- A. *The Red Farm House*, 600 S. Warson Road. This farm house is a typical rural farm dwelling of the early 19th Century built by a German immigrant who was a carpenter and potato farmer.
- B. *Twin Springs Farm*, 1700 S. Warson Road. This Presidential land grant home was built in 1832 as two log cabins.
- C. *The Denny Home or "Plantation"*, 10041 Conway Road. This home was originally constructed in 1829 on land granted by President Monroe in 1824, and it was expanded during the Civil War.

D. *The Station*, 10002 Litzsinger Road. This property was obtained through a Congressional New Madrid Earthquake certificate. The present dwelling was built in 1834 by a German immigrant, and it served as the site of Evangelical Lutheran worship services until the construction of the church which is now the Parkway United Church of Christ at Clayton and Ballas Road.

E. *The Moydalgan House*, 8956 Moydalgan Drive. This home was constructed by the McKnight family in 1848 and enlarged in 1907; its original outbuildings are still intact;

24. The present City of Ladue was founded in 1936 by merger of the pre-existing residential villages of McKnight, Deer Creek, and Ladue; the archives and regular business records of the three villages are now maintained as part of the archives and general business records of the City of Ladue under my overall custody and control;

25. The three villages had all employed Harland Bartholomew, the renowned City Planner, the founder of Harland Bartholomew & Associates ("HBA") to represent and advise them in planning, land use and regulatory matters, and the City of Ladue has continuously employed that firm for the same purpose from 1936 to the present time;

26. A biographical resume of the late Mr. Bartholomew published in 1952, is attached to, and incorporated in, the Affidavit of Malcolm C. Drummond as Drummond Aff. Ex. E;

27. Each of the three pre-existing villages was a pioneer in the adoption of strict zoning and land use regulations, drafted, in each case by Harland Bartholomew, in the late 1920's and early 1930's to assure preservation

of the spacious, residential quality of the area in its future development;

28. The zoning districts of Deer Creek, Ladue and McKnight Villages contained average required minimum residential lot sizes which were comparatively large, including significant areas zoned for 3-acre, 1.8 acre, and 30,000 square feet ( $\frac{3}{4}$  acre) residential lots; these relatively large lots reflected the predominant residential land use pattern at the time the ordinances were adopted;

29. The present City of Ladue was planned from its creation to continue to be, and to develop as, primarily a residential area building on the regulations and traditions of the three pre-existing villages;

30. Shortly after the city's incorporation in 1936 it engaged Mr. Harland Bartholomew to prepare a Comprehensive City Zoning Plan to guide the City's development. A true and accurate copy of "A Preliminary Report Upon a City Plan, City of Ladue, Missouri", submitted by Mr. Bartholomew to the City Council of Ladue in March, 1939 describing the plan adopted by the City, as it appears in the archives and records of the City kept in the regular course of the City's business, is attached to, and incorporated in, the Affidavit of Malcolm C. Drummond as Drummond Aff. Ex. D;

31. Ladue's Comprehensive City Plan was incorporated upon its adoption into the City's zoning code and while there have been minor changes to the zoning code over the years the Comprehensive Plan has never been amended in its 52 years of use, and it is still in full force and effect today;

32. Since the City adopted the Comprehensive City Plan recommended by Mr. Bartholomew at the time of the City's creation, it has been both consistent and unwavering in implementing it, and it has been both consistent and unwavering in disapproving any architectural, aesthetic, zoning or land use changes which would be out

of keeping with the original vision set out by Harland Bartholomew;

33. Shortly after its incorporation, and while Mr. Bartholomew was in the process of preparing the City's Comprehensive Plan, Ladue adopted an ordinance, also drafted by HBA, which consolidated and codified the zoning districts and land use restrictions of the three predecessor villages; a true and accurate copy of Ladue's Original Zoning Ordinance as it appears in the archives and records of the City kept in the regular course of the City's business is attached to, and incorporated in, the Affidavit of Malcolm C. Drummond as Drummond Aff. Ex. Y;

34. A true and accurate copy of Ladue's present zoning ordinance as it appears in the archives and records of the City kept in the regular course of the City's business, and in the official City Code, is attached to, and incorporated in, the Affidavit of Malcolm C. Drummond as Drummond Aff. Ex. F;

35. A true and accurate copy of Ladue's zoning map in its present form as it appears in the archives and records of the City kept in the regular course of the City's business is attached to, and incorporated in, the Affidavit of Malcolm C. Drummond as Drummond Aff. Ex. G;

36. To my knowledge, Ladue has not permitted any significant spot zoning changes since its earliest years and it has never permitted any significant modification of its zoning districts and its zoning map has remained essentially unchanged for over 50 years (except of course for the addition of property acquired by annexation); the city, in my experience, has granted hardship variances from minimum size, setback distance and similar requirements rarely;

37. Ladue has repeatedly and consistently denied attempts to decrease the restrictiveness of its residential zoning districts or to change residential zoning areas to commercial use;

38. For example, Ladue for many years has consistently and successfully resisted attempts to change any zoning on its Lindbergh Boulevard frontage from single-family residential to commercial, even though Lindbergh Boulevard is a major commercial artery in metropolitan St. Louis;

39. The City has also successfully resisted, with my full and active support, applications to change the zoning classification along the south side of the "Outer Road" of State Highway 40 to allow for commercial development, believing that such development would inevitably bring visual blight and urban clutter;

40. Over many years, Ladue has demonstrated its willingness to defend vigorously its right to impose strict zoning and architectural review regulations in conformity with its Comprehensive Plan and it has consistently prevailed in defeating all legal challenges to its zoning and architectural restrictions as reflected in numerous reported appellate decisions: in *Flora Realty Investment Co. v. City of Ladue*, 246 S.W.2d 771 (Mo. banc 1952), the Missouri Supreme Court upheld the reasonableness and validity of Ladue's overall comprehensive zoning plan and specifically upheld the validity of its 3-acre minimum lot single family residential zoning of a property owner's unimproved tract of more than 100 acres; in *Deacon v. City of Ladue*, 294 S.W.2d 616 (Mo. App. 1956), the Court of Appeals upheld Ladue's single-family residential 10,000 square foot minimum zoning of property which the owner believed should be commercial; in *Stoyarnoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970), the Missouri Supreme Court upheld Ladue's authority to create an Architectural Review Board with complete power to regulate architectural design and appearance for the purpose of promoting and maintaining general conformity with the style and design of surrounding structures; in *Tealin Co. v. City of Ladue*, 541 S.W.2d 544 (Mo. banc 1976), the Missouri Supreme Court upheld the City's right to main-

tain single-family residential rather than commercial zoning on Lindbergh Boulevard (one of the major commercial arteries in St. Louis County); and in *Gerchen v. City of Ladue*, 784 S.W.2d 232 (Mo. App. 1989), the Missouri Court of Appeals rebuffed the attempt of another property owner to change the zoning classification of its Lindbergh Boulevard property from single family residential to commercial;

41. Although population density in Ladue is very low, there are very few large tracts of residential land, and no tracts of commercial or industrial land remaining to be developed in the City given existing zoning regulations;

42. Ladue has strictly controlled the type of commercial businesses which have developed in the limited commercial areas through zoning regulations and special use permit requirements; as a result, except for two supermarkets and four gasoline filling stations, Ladue's commercial establishments are almost exclusively small walk-in retail, restaurant, and banking businesses with less than 15,000 square feet;

43. This small degree of commercial development is in striking contrast to the situation in each of Ladue's immediately adjacent neighbors: Clayton, Richmond Heights, Brentwood, Frontenac, Creve Coeur, Olivette, and University City;

44. In the twenty one (21) years of my service as an elected official, Ladue has continued its historic tradition of making extraordinary and consistent efforts to preserve and enhance the aesthetic quality of its environment; in 1981 I was honored for my personal efforts in this area with the award of the Garden Club of America's Medal of Merit for exceptional contributions in the field of civic achievement;

45. For example, for reasons of aesthetics, privacy, environmental harmony and visual quality, Ladue has never allowed such common accessory uses of property



as: unscreened parking of recreational vehicles, boats, or commercial trucks; outside parking of vehicles being repaired; installation of front fences exceeding 42 inches in height or lacking at least 40% of openness; cyclone fences; or installation, except in extraordinary circumstances, of unscreened satellite dishes;

46. For the same reasons, Ladue has never permitted such ubiquitous zoning uses as apartment buildings, duplexes, condominiums, hotels, motels, rooming houses, fraternity or sorority houses, or parking garages;

47. In the interests of aesthetic and visual harmony, the City has carefully regulated all architectural changes since its earliest years; and Architectural Review Board was first established in 1940, and all applications for building permits affecting the outward appearance of buildings either already constructed or to be constructed must be reviewed by this Board before being approved by the Building Commissioner;

48. Unlike most of its neighboring suburban communities (including the adjacent county seat of Clayton), Ladue places strict limits on the height of buildings; in the interests of aesthetic harmony, no building (including an office building) can exceed 2½ stories; at the present time there is only one building in Ladue which exceeds that limit (three stories, by virtue of a special use permit);

49. Ladue has chosen to be, and has vigorously sought to remain, predominantly a residential community, very small portions of which have been zoned for commercial and industrial use;

50. The present city limits contain 5,456 acres or 8.566 square miles, of which a total of approximately 84% or 5,283 acres is in residential use (including 700 acres of public and private roads), approximately 13.9% or 721 acres is in public or semi-public use such as schools, public parks, and religious institutions, approxi-

mately 1% or 51 acres is in commercial use, and approximately 2% or 102 acres is in industrial use;

51. A true and accurate color photograph which fairly and accurately portrays an aerial view of the City of Ladue in 1986 is attached hereto, and incorporated herein by reference as, Spink Aff. Ex. A;

52. A true and accurate black and white photograph which fairly and accurately portrays an aerial view of the City of Ladue in 1990 is attached hereto, and incorporated herein by reference as, Spink Aff. Ex. B;

53. A true and accurate color-coded map of the City of Ladue showing the areas which are zoned residential, commercial and industrial is attached to, and incorporated in, the deposition of Malcolm C. Drummond and incorporated therein by reference as Drummond Aff. Ex. H;

54. Ladue's land use pattern is completely consistent with the City's history, its Comprehensive Plan, and its desire to maintain an open, rural residential community of uncluttered appearance;

55. Ladue is a community of larger than average residential lots, extensive landscaping with plant materials and large public, semi-public, and private open spaces;

56. Ladue's zoning requires much greater than average set-back distances from lot boundaries;

57. Ladue to my knowledge is one of the very few communities in the St. Louis area with zoning districts for 3 acre and 1.8 acre residential lots;

58. Ladue is unique in the high percentage of its area which is zoned for the much larger than average 3 acre or 1.8 acre lot sizes; 17.6% of Ladue's land is zoned for 3 acre residential usage and 41.1% is zoned for 1.8 acre residential usage; more than 75% of Ladue's total land area is zoned for single family residential usage with

minimum lot sizes of three quarters ( $\frac{3}{4}$ ) acre (30,000 square feet) or greater;

59. To my personal knowledge, many homes in Ladue are on lots which exceed the minimum requirements of their zoning districts;

60. Although approximately 84% of Ladue's land is zoned for residential use, the City's planning and land use consultants, HBA, have calculated that residential structures actually cover less than 5% of the land in Ladue, and this low building density contributes to the spacious, open, country-like and uncluttered appearance which Ladue prizes;

61. The large lot sizes and low building density have allowed for the maintenance of large areas of lawns, planted materials, woods, streams, horseback riding trails, and open areas which, to my personal observation, make Ladue unique in the St. Louis metropolitan area;

62. One distinctive feature about Ladue is the fact that it is virtually the only St. Louis suburb which has left its natural drainage ways in their natural state; most of Black Creek (at least two miles) and nearly all of Deer Creek and its tributaries (at least ten miles) have been left in their natural condition; almost without exception, the City of St. Louis and other St. Louis suburbs have boxed and channelized their streams, often underground, to accommodate development; Ladue's natural streams and woods greatly enhance the City's aesthetic impression of being a country-like, natural, open and uncluttered residential community;

63. Except for a small percentage of Ladue's homes which are located on Litzsinger Road, Warson Road, McKnight Road, Lay Road, Clayton Road, Ladue Road, Price Road, Old Warson Road, Des Peres Road and Lindbergh, the homes in Ladue are contained within private subdivisions, with deed covenants and/or restric-

tions administered by subdivisions trustees restricting the use of private property within the subdivisions;

64. Ladue is very unusual in that, to my knowledge, in fewer than a half dozen of the city's approximately 102 residential subdivisions were a majority of the homes built by a single developer/builder; for this reason Ladue's residential areas have a much greater than average charm and aesthetic appeal and they have largely avoided the subdivision tract appearance of many modern suburbs;

65. 207 of Ladue's 210 subdivision streets and lanes are privately owned and maintained by subdivision trustees; by tradition and trustee decisions, these streets—although they are country-like, charming and private—are extremely narrow (generally 16, 18 or 20 feet) typically lack curbs or gutters, lack on-street parking space, lack adjacent sidewalks, and are partially obstructed by moveable obstacles known as "horses" to slow traffic; they are typically undulating and winding;

66. A true and accurate copy of a videotape which fairly and accurately portrays typical Ladue Subdivision Lanes is attached hereto and incorporated herein by reference as Spink Aff. Ex. C;

67. A very good example of Ladue's adherence to its original Comprehensive Plan is the fact that the City's zoning map and its zoning districts are essentially the same today as they were when the city was created (with the addition of such property as has been annexed)—such changes as have been made have been minor and essentially insignificant;

68. Ladue's zoning and land use regulations and its unswerving fidelity to Harland Bartholomew's original plan to my personal observation have been highly successful in achieving the quality of environment, aesthetic excellence, and property values which are the aim of the Comprehensive Plan and have always been the aims of City government since I have been an elected official;

69. In 1974, the City engaged HBA to prepare a study and report on the effectiveness of the original Comprehensive Plan and original comprehensive zoning ordinance after their first 35 years of existence; the basic conclusion of the 1974 study, with which the City Council agreed, was that the City's Comprehensive Plan was working very well and needed no amendment. A true and accurate copy of the 1974 study, "A Preliminary Report Upon the Comprehensive Plan, City of Ladue, Missouri, April, 1974," as it appears in the Archives and regular business records of the City, is attached to, and incorporated the Affidavit of Malcolm C. Drummond as Drummond Aff. Ex. I;

70. Ladue has made a major effort since I have been an elected official to improve the aesthetics, beauty and physical harmony of the City's principal commercial area on both sides of Clayton Road from Conway Road westwardly to the Highway 40 overpass (now known as "The Special Business District"), as well as the small commercial areas at the intersection of Lindbergh and Clayton Road, the intersection of Clayton Road and Price Road, on Ladue Road the small industrial area near Hunter Avenue and Highway 170, the Highway 40 access to Clayton Road, and the area of the Ladue Road access to Highway 170;

71. In 1983, after many years of planning, the City created the Special Business District consisting of the City's principal commercial area on Clayton Road between Conway and Highway 40; by means of City appropriations and special assessments the City was able to accomplish the following:

- a) Repavement of the road;
- b) Improvement of sewer and water drainage;
- c) Installation of new and aesthetically attractive traffic signals;

- d) Removal of all overhead telephone poles and wires and electric poles and wires from the street scape;
- e) Planting of trees and shrubs and the placement of flower tubs on both sides of the street;
- f) Construction of sidewalk on the north side of Clayton Road.

72. The aesthetics and appearance of the Special Business District were carefully planned and executed by the City in consultation with property owners and with HBA which prepared a detailed study and recommendation dated June 24, 1982, a true and accurate copy of which is attached to and incorporated in, The Affidavit of Malcolm C. Drummond as Drummond Aff. Ex. J;

73. A true and accurate copy of the color rendering of the 1982-1983 Special Business District Improvements prepared by HBA is attached to, and incorporated in the Affidavit of Malcolm C. Drummond as Drummond Aff. Ex. K;

74. A true and accurate copy of the blueprint for the 1982-1983 Special Business District Improvement prepared by HBA is attached to, and incorporated by reference in, The Affidavit of Malcolm C. Drummond as Drummond Aff. Ex. L;

75. The total public and private cost of the Special Business District Improvement Project has been approximately three quarters of a million dollars (750,000);

76. The aesthetic upgrading and improvement of the Special Business district were quite dramatic;

77. True and accurate photographs which fairly and accurately portray the appearance of the Special Business District *before* the improvements made in 1982-1983 are attached to and incorporated in the Affidavit of Malcolm C. Drummond as Drummon Aff. Exhibits M through P;



78. True and accurate photographs which fairly and accurately portray the appearance of the Special Business District *after* the improvements made in 1982-1983 are attached to and incorporated by reference in the Affidavit of Malcolm C. Drummond as Drummond Aff. Exhibits Q through T;

79. As a result of the aesthetic improvements made by Ladue in connection with the Special Business District improvements, Ladue received the Governor's Town Tree-scape Award in 1984 from Governor Christopher Bond. A true and accurate copy of the Award received by the City is attached to, and incorporated in, the Affidavit of Malcolm C. Drummond as Drummond Aff. Ex. U;

80. The intense public interest in Ladue in maintaining exceptionally high aesthetic and environmental standards is demonstrated by long-standing and continuous efforts by both the City and private organizations to upgrade, improve and beautify all areas visible to the public;

81. In order to foster and encourage the beautification and aesthetic improvement of all public and semi-public areas of Ladue, the City has a Civic Improvement Committee which was created in the late 1940's and which has been in continuous existence ever since; this group, of which I am a very active member, and which I served as Chairman for 5 years, facilitates and oversees the careful planning, planting, care and maintenance of trees, shrubs and flowers in public and semi-public areas;

82. This is reflected in the true and accurate copies of the minutes and activity summaries of the Civic Improvements Committee from 1970 through 1990 which are attached hereto and incorporated herein by reference as Spink Aff. Ex. D;

83. Attached hereto and incorporated herein by reference are true and accurate copies of photographs of recent date which fairly and accurately portray various repre-

sentative beautification projects accomplished by the Civic Improvement Committee (in which I have been personally involved) as identified below:

Spink Aff. Exh.	Location	Approximate Project Date	Project
E	McKnight at Litzsinger	1984-90	Creating annual flower plot and planting of trees
F	McKnight at Litzsinger	1990	Adding shrubbery to annual flower plot
G	Clayton Rd. at Lindbergh	1988-90	Planting and care of trees, annuals, ground cover and bulbs
H	Clayton Rd. at Lindbergh	1988-90	Planting and care of trees, annuals, ground cover and bulbs
I	Clayton Rd. at Lindbergh	1988-90	Planting and care of trees, annuals, ground cover and bulbs
J	Exit Ramp Hwy. 40 to Warson Road	1988-89	Landscaping, planting and maintenance of trees, shrubs, ground cover and flowers
K	Hwy. 270 at Ladue Rd.	1989	Landscaping and planting trees and shrubs on access ramp islands
L	Hwy. 270 at Ladue Rd.	1989	Landscaping and planting trees and shrubs on access ramp islands

Spink Aff. Exh.	Location	Approximate Project Date	Project
M	Exit ramp from Hwy. 40 to Clayton Rd.	1988-89	Landscaping, shrubbery, flower tubs
N	Clayton Rd. Business Area	1983- Present	Landscaping, planting
O	Clayton Rd. Business Area	1983- Present	Landscaping, planting
P	Clayton Rd. at Price	1983	Planting flowers and ground cover
Q	Clayton Rd. Business Area	1983	Planting trees
R	Warson/Clayton Underpass	Mid-70's to Date	Landscaping and planting trees and shrubs
S	McDonald Service Station, Clayton Rd. at Price	Mid-80's to Date	Planting trees, shrubs and flowers

84. Ladue has consistently adhered to the advice provided to it by its planning consultants, HBA, that the location, existence and design of signage in a community directly affect the community's visual and aesthetic appeal, and that the careful regulation of signage is an essential element of city planning;

85. Ladue has also consistently heeded the advice of HBA that most types of temporary signs and some types of permanent signs, whether on private property or on public easements or in the public right-of-way, create a special risk of visual blight through proliferation because there are no natural limitations on their number or duration;

86. I am personally aware and have personally observed that many interest groups, political organizations, other associations, groups, and individuals distribute signs and placards in volume from time to time for display in

the St. Louis metropolitan area, both in private yards and in public areas and the public rights-of-way;

87. I am also personally aware that many St. Louis suburban communities which do not restrict such signs experience unsightly proliferation of temporary or permanent signs constructed by residents or merchants themselves for many purposes;

88. Based upon my personal knowledge and experience, many municipalities in St. Louis County which do not strictly limit the erection of signs frequently experience a proliferation of yard signs and placards and temporary and permanent signs in the campaigns before municipal, primary, or general elections but such proliferation can and often does occur at other times as well;

89. Ladue has strictly limited signage in its city limits in the interests of aesthetics, privacy, maintenance of property values, and safety since it was incorporated;

90. From the earliest days of the three predecessor villages to Ladue until the late 1950's Ladue had strict signage restrictions and prohibitions incorporated in the applicable zoning ordinances themselves; true and accurate copies of those zoning ordinances as they appear in the City's Archives and regular business records are attached to and incorporated in the Affidavit of Malcolm C. Drummond as Drummond Aff. Exhibits V through Z;

91. Beginning in 1959, the sign restrictions of Ladue were separated from its zoning code and set apart in a separate ordinance and City Code Section; true and accurate copies of all of Ladue's sign ordinances and their amendments from 1959 through the present time as they appear in the Archives and the regular business records in the City of Ladue are attached to, and incorporated in, the Affidavit of Malcolm C. Drummond as Drummond Aff. Exhibits AA through JJ;

92. Before the filing of this litigation, Ladue had never to my knowledge experienced a proliferation of signs either in residential neighborhoods or in public streets and rights-of-way;

93. Since the filing of this litigation, and since the agreement of the City temporarily to forego the enforcement of its new sign ordinance against non-commercial speech, I have personally become aware of examples of unsightly sign proliferation;

94. For example, in February 1991, I observed numerous temporary signs stating "Jay Levitch—50—Happy Birthday" on private property and on the public right-of-way; true and accurate copies of photographs which fairly and accurately portray this unsightly proliferation of signs at at least 9 locations are attached hereto and incorporated herein by reference as follows:

Location	Spink Aff. Exhibit
Clayton at Price, Southwest corner	T
Clayton at Hwy 40, Southeast corner	U
Clayton at Warson, Northeast corner	V
Litzsinger at Warson, Northwest corner	W
Old Warson at Woodlawn, Northwest corner	X
Clayton at Warson, Northwest corner	Y
14 Midpark Lane	Z
Warson at Woodlawn, Southwest corner	AA
Warson at Woodlawn, Northwest corner	BB

95. On January 21, 1991, at the regular public meeting of the City Council, the City duly adopted an ordinance which repealed its former Chapter 35 of the Ladue City Code and adopted a new Chapter 35 in its place; Councilmen Hensley, Johnston, Wood and Fonyo voted to pass the ordinance, Councilman Remington abstained, Councilman Mudd was absent, and I did not have a vote;

this ordinance was duly signed by me as Mayor on January 22, 1991, and the ordinance became effective as of the date. A true and accurate copy of said new ordinance as it appears in the Archives and regular business records of the City of Ladue is attached to this stipulation and incorporated herein by reference as Spink Aff. Exhibit CC;

96. At the regular public meeting of the City Council on January 21, 1991, the council also adopted an ordinance which repealed a section of the City Code which had permitted the erection of garage sale signs in residential neighborhoods; this ordinance was duly signed by me as Mayor on January 22, 1991, and the ordinance became effective on that date. A true and accurate copy of said ordinance as it appears in the Archives and regular business records of the City of Ladue is attached hereto and incorporated herein by reference as Spink Aff. Exhibit DD;

97. A true and accurate copy of the official minutes of the Council Meeting of January 21, 1991 as approved by the Council and as they appear in the Archives and regular business records of the City of Ladue are attached hereto and incorporated herein by reference as Spink Aff. Exhibit EE;

98. At the regular public meeting of the City Council on February 25, 1991, the Council adopted an additional ordinance, which made certain technical corrections and minor modifications to the new sign ordinance; Councilmen Hensley, Johnston, Wood, Fonyo voted to pass the ordinance and Councilman Mudd abstained, Councilman Remington was absent, and I did not have a vote; I duly affixed my signature to the ordinance on the same day, at which time it became effective; a true and accurate copy of the entire new City sign code, as amended on February 25, and as it presently exists, is attached hereto and incorporated herein by reference as Spink Aff. Exhibit FF;

99. Plaintiff Margaret Gilleo, resides in the private Willow Hill subdivision of the city of Ladue;



100. The Willow Hill subdivision in which plaintiff resides is a private residential subdivision governed by a trust indenture, a true and accurate copy of which is attached hereto and incorporated herein by reference as Spink Aff. Exhibit GG;

101. Willow Hill Lane, the street on which Plaintiff resides, is a private street owned and maintained by the trustees of Willow Hill subdivision;

102. The Willow Hill subdivision consists of 57 private single-family homes, the only access to which is by means of Willow Hill Lane which connects to Ladue Road;

103. Willow Hill Lane is not a thoroughfare;

104. As a long-time resident of Ladue, and as Mayor, I am personally aware that plaintiff has at least the following forms of expression actually available to her for the expression of the message she desires to convey on her sign, each of which would be fully consistent with Ladue's zoning, land use, and sign ordinances and not inconsistent with Ladue's strong interests in aesthetics, privacy, maintenance of property values, and safety;

- A. Letters, handbills, or flyers mailed to the residents of Willow Hill subdivision or to a broader audience;
- B. Letters, handbills, or flyers personally delivered to the residences in the Willow Hill subdivision or to a broader audience;
- C. Person-to-person and/or door-to-door solicitation of neighbors in Willow Hill subdivision or a broader audience) to support plaintiff's position;
- D. Telephone calls to her Willow Hill neighbors or to a broader audience to solicit support for plaintiff's views;
- E. Paid advertisements in newspapers or local circulation in Willow Hill subdivision in Ladue and/

or over a broader area including but not limited to the St. Louis Post Dispatch, the St. Louis Suburban Journal and the Ladue News;

- F. Use of a bumper sticker bearing a similar legend on plaintiff's automobile;
- G. Speaking at neighborhood meetings;
- H. Inviting neighbors to tea or coffee or cocktails in plaintiff's own home to discuss the issue of concern to her and to seek to persuade others to adopt her view;
- I. Writing letters to the editor for newspapers and other periodicals in circulation in the City of Ladue and metropolitan St. Louis including, but not limited to, the St. Louis Post Dispatch and the St. Louis Suburban Journal;
- J. Calling to radio talk shows in suburban St. Louis sponsored by several local radio stations;
- K. Making use of "public forum" commentary opportunities provided by most or all of the television stations in the metropolitan St. Louis area including the local affiliates of each of the three national commercial networks, the local affiliate of the Public Broadcasting System, two local independent stations, and the local access channel provided by our cable television franchisee;
- L. Arrangement for use of numerous public premises of the county, or school districts or library district, or of numerous private premises of schools and churches, located in Ladue, for a public meeting.

/s/ Edith J. Spink  
EDITH J. SPINK

[Notarization Omitted in Printing]



CITY OF LADUE  
1986



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

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[Caption Omitted in Printing]

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**SECOND AMENDED COMPLAINT**

Comes now Margaret P. Gillico and, for her Second Amended Complaint, states as follows:

*Parties*

1. Plaintiff is a citizen and resident of the State of Missouri, residing in St. Louis County, Missouri, within the City of Ladue.

2. Defendant City of Ladue is a Class 4 City located within St. Louis County and the State of Missouri. Defendant Spink is the Mayor of Ladue and an *ex officio* member of the City Council. Defendant Remington, Hensley, Johnston, Wood, Mudd and Fonyo are members of the Ladue City Council, of which Remington is president.

*Jurisdiction*

3. Plaintiff alleges claims under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the Constitution of the United States.

4. The Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343 because Plaintiff alleges claims arising under the First and Fourteenth Amendments to the United States Constitution.

5. Venue is proper in this Court under 28 U.S.C. § 1391(b) because the claims arose in this judicial district.



*Statement Of Claim*

5. On or about December 8, 1990, Plaintiff placed upon her own property located within the City of Ladue a sign stating "SAY NO TO WAR IN THE PERSIAN GULF CALL CONGRESS NOW" for the purpose of expressing her belief in opposition to war in the Persian Gulf.

6. The sign was taken from Plaintiff's property on December 8, the same day she put it up.

7. On or about December 10, 1990, Plaintiff replaced the sign with an identical sign. The next day, the sign was knocked down, apparently by vandals.

8. Plaintiff called the Police Department for the City of Ladue to request assistance in protecting her sign from vandals. Plaintiff was informed at that time that posting such signs was against a Ladue ordinance.

9. Plaintiff then telephoned Ladue City Hall in order to obtain further information regarding the ordinance. She was advised that such signs were not permitted in Ladue.

10. On or about December 12, 1990, Plaintiff went to Ladue City Hall to obtain a copy of the ordinance. She was given a copy of the ordinance ("old Chapter 35") (attached hereto as "Exhibit A"). Plaintiff read the ordinance and believed she could obtain a permit to display her sign from E. C. Hankins, the Ladue City Clerk. However, Plaintiff was further advised that Mr. Hankins was unavailable but would be available on December 13.

11. On December 13, Plaintiff returned to Ladue City Hall and was again advised that Defendant Hankins was not in. She was then referred to Chief Calvin Dierberg, the Ladue Chief of Police. Chief Dierberg asked Plaintiff what her sign said, and Plaintiff told him. Chief Dierberg then advised Plaintiff that he could not issue

her a permit to display the sign, but she could attend the next City Council meeting to petition the Council for permission to display the sign.

12. On December 17, 1990, Plaintiff appeared before the City Council of the City of Ladue, at a regularly scheduled council meeting, and requested the issuance of a permit to place the aforementioned sign on her property.

13. A vote was held by the City Council denying Plaintiff a permit to place such sign upon her property.

14. On December 20, 1990, Plaintiff initiated this lawsuit, seeking to have Old Chapter 35 declared unconstitutional and its enforcement enjoined, on grounds that it unlawfully infringed Plaintiff's constitutional rights to free speech. An evidentiary hearing was held on December 26, 1990, at which time Plaintiff and Defendants presented evidence with regard to the issue of the ordinance's constitutionality.

15. On January 7, 1991, following the filing of motions and briefs, this Court issued a preliminary injunction and memorandum decision finding the ordinance unconstitutional on its face and prohibiting Defendants from enforcing the ordinance.

16. On January 21, 1991, the City of Ladue repealed old Chapter 35 and enacted a new chapter dealing with signage in Ladue ("new Chapter 35").

17. On February 25, 1991, the City Council of Ladue amended new Chapter 35, making several changes to the existing chapter.

18. Defendants' new Chapter 35, likewise, violates the rights of free speech protected by the First Amendment of the Constitution of the United States for the same reasons alleged in Plaintiff's original Complaint and as found by the Court in its January 7, 1991, Memorandum And Order, and it should be invalidated.

19. Defendants have agreed by stipulation that they will not enforce, or cause to be enforced, any of the provisions of new Chapter 35 until such time as this Court rules on the merits of this case and the permanent injunction sought by Plaintiff.

20. Plaintiff presently has a sign displayed on her property expressing her views relating to events in the Persian Gulf and wishes to maintain that sign on her property. Defendants have made it clear that, absent judicial intervention, they will prevent Plaintiff from displaying the sign in question.

21. Any actions of the City which would seek to restrain Plaintiff's freedom of speech and/or the denial of a permit to place signs upon her property will cause Plaintiff irreparable harm and will result in damages to Plaintiff that are difficult, if not impossible, to ascertain.

22. Unless Defendants are enjoined from removing the aforementioned signs from Plaintiff's property, or alternatively enjoined from seeking to enforce the unconstitutional new Chapter 35, constitutional rights of Plaintiff will be impermissibly abridged.

WHEREFORE, Plaintiff demands that the Court enter the following orders and relief:

1. A permanent injunction restraining and prohibiting Defendants from, directly or indirectly, alone or in concert with others, enforcing the provisions of the Ladue City Ordinance, New Chapter 35, or thereafter enacting another ordinance which violates the First Amendment rights of Plaintiff and others similarly situated.

2. A permanent injunction restraining and prohibiting Defendants, or their representatives, from removing the aforementioned signs from the property of Plaintiff or others similarly situated.

3. An award of summary judgment on Plaintiff's claims pursuant to the Motion For Summary Judgment filed on February 11, 1991.

4. An order awarding Plaintiff's counsel reasonable attorneys' fees and costs of court.

5. Whatever additional relief the Court may deem appropriate under the circumstances.

GREEN, HOFFMAN & DANKENBRING  
For the American Civil Liberties  
Union of Eastern Missouri

By: /s/ Mitchell A. Margo  
MARTIN M. GREEN  
GERALD P. GREIMAN  
MITCHELL A. MARGO  
7733 Forsyth Boulevard, Suite 800  
St. Louis, MO 63105  
314-862-6800  
Attorneys for Plaintiff

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

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[Caption Omitted in Printing]

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AFFIDAVIT OF NANCY R. SACHS

Nancy R. Sachs, being first duly sworn, states as follows:

1. I am a resident of the City of Ladue, residing at 32 Dromara Road. I have been a resident of Ladue since 1956.

2. Although I have lived in Ladue for approximately 35 years, I was not aware until December 19, 1990, that Ladue had an ordinance preventing me from placing a sign on my property if I so desired. I have never placed a non-commercial, political yard sign on my property.

3. I am aware that the City of Ladue enacted a new sign ordinance on January 21, 1991, which, if enforced, would prevent me from placing a small political, non-commercial yard sign on my property.

4. I am also aware that the ordinance states that its purpose is to prevent a proliferation of yard signs in Ladue.

5. I do not believe that this restrictive and prohibitive ordinance is necessary to prevent a proliferation of yard signs in Ladue.

6. When the City of Ladue made the public announcement that it would not enforce the terms of its ordinance until the federal court ruled on the constitutionality of the ordinance, I decided this would be the perfect time to see for myself whether the lack of enforceable ordi-

nance—in effect no ordinance—would lead to a proliferation of political, non-commercial signs in Ladue.

7. On five separate occasions between January 30, 1991, and February 16, 1991, I toured various subdivisions within the City of Ladue, checking specifically for political, non-commercial yard signs in the various residential subdivisions.

8. I reasoned that, during this tense period of war in the Middle East and highly-charged debate among the citizens of Ladue over this sign ordinance, the residents of the City of Ladue were more likely to put up yard signs than ever before.

9. On January 30, 1991, I toured McKnight Road, Ladue Road within the City of Ladue, La Hacienda, Dromara Road and Price Road. I did not see a single political, non-commercial sign along any of those roads. I did see several American flags and yellow ribbons tied around trees, mailboxes and front doors, but I do not know whether these are considered signs under the Ladue ordinance. It should be noted that I have always seen American flags on private property throughout the City of Ladue.

10. On February 6, 1991, I toured Willow Hill and McKnight Road. I saw no political, non-commercial signs on any residential property in those two sections of Ladue.

11. On February 8, 1991, I toured Lorenzo Lane, Whitegate Lane, Brookside, Glen Eagles and Price Road. I did not see a single political, non-commercial yard sign along any of those roads or in any of those subdivisions. Again, as in the past, I did see some American flags and yellow ribbons.

12. On February 12, 1991, I toured Colonial Hills, McKnight Road, Dromara Road, Nassau, Fleetwood, Willow Hill, La Hacienda and Price Road. I did not see



a single political, non-commercial yard sign along any of those roads or in any of those subdivisions.

13. On February 16, 1991, I toured Ladue Manor, Braeburn, Cella Road, Pine Valley, Barnes Road, Upper Barnes Road, Conway Road (from Clayton Road to Warson Road), Conway Close, Warson Road (from Clayton Road to Ladue Road), Picardy Lane, Old Chatham, Upper Ladue Road, Fordyce Lane, Ladue Road (from McKnight Road to Lindbergh Boulevard) and Clayton Road (from McKnight Road to Lindbergh Boulevard). I did not see any political or non-commercial yard signs along any of these roads or in any of these subdivisions other than American flags and some yellow ribbons.

14. From my informal survey, I can only conclude that there will be no proliferation of non-commercial, political yard signs in the City of Ladue even if the city had no sign ordinance and the residents were left to themselves to decide whether or not to put up yard signs on their property.

15. I believe that the City Council of Ladue has decided it does not like the content of political, non-commercial messages expressed in many yard signs; that this content-based dislike of yard signs at least partly has motivated Ladue's ban of such signs; and that Ladue's assertions that allowing political, non-commercial signs in the City of Ladue would create a proliferation of those signs are false, speculative and largely based on content.

16. As further evidence of my belief that there would be no proliferation of signs, even absent a sign ordinance in its entirety, I attach to this affidavit a letter I received from Mayor Edith Spink dated January 11, 1991, in which the residents of Ladue were asked, in essence, whether they favored the city continuing a legal battle to eliminate political, non-commercial yard signs in Ladue.

17. Mayor Spink announced that sixty percent (60%) of those who responded to the letter were in favor of the city banning all political yard signs, and forty percent (40%) were opposed. If sixty percent of the residents of Ladue favor banning yard signs, then that sixty percent certainly would not put up a yard sign. Certainly there can be no proliferation of signs in Ladue given that only forty percent of the people would even consider placing a yard sign on their property. It is also my belief that of the forty percent who would consider putting up yard signs, many of those are of similar inclination to me; that is, I probably would not place a yard sign on my property, but, as an American citizen, I very dearly value the right to do so if I choose, and no government should be able to prevent me from exercising that right.

Further affiant sayeth not.

/s/ Nancy R. Sachs  
NANCY R. SACHS



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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

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[Caption Omitted in Printing]

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SUPPLEMENTAL AFFIDAVIT OF  
EDITH J. SPINK

Comes now Edith J. Spink, being first duly sworn upon her oath who deposes and says as follows:

1. I am the same Edith J. Spink who executed an affidavit dated March 1, 1991 in support of defendants' motion for summary judgment filed herein, and I make this supplement to my affidavit.

2. The first Tuesday in April every year is a general municipal day election day throughout Missouri. Section 115.123, (RSMo. 1986). Other regular election days in Missouri occur in February, March, June, August and November. *Id.*

3. On Wednesday, March 20, 1991, I personally toured areas of the Cities of Brentwood and Clayton, both immediately adjacent to the City of Ladue, and I observed a general proliferation of yard signs relating to the 1991 April general municipal elections, both on private property and in public areas and street rights-of-way.

4. Attached hereto and incorporated herein by reference as Spink Affidavit Exhibit HH is a true and accurate copy of a videotape, made in my presence and under my direct supervision on March 20, 1991, reflecting the proliferation of yard signs then existing, which truly and accurately portrays the appearance of the streets and areas shown in the videotapes as of that time, including:

*Brentwood*

Pine Avenue  
 Kempton Lane  
 Sonora

*Clayton*

Wydown Boulevard  
 Ridgemoor Drive  
 Claverach Park  
 Broadview Drive  
 Edgewood Drive  
 Carswold Drive  
 Walinca Terrace  
 Oakley Drive  
 Shirley Drive

FURTHER, AFFIANT SAYETH NOT.

/s/ Edith J. Spink  
 EDITH J. SPINK

[Notarization Omitted in Printing]

## SUPREME COURT OF THE UNITED STATES

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No. 92-1856

CITY OF LADUE, *et al.*,  
*Petitioners*

v.

MARGARET P. GILLES

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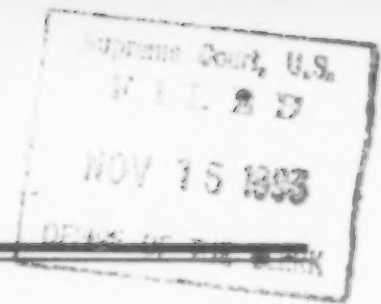
## ORDER ALLOWING CERTIORARI

Filed October 4, 1993

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 16, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 14, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, January 5, 1994. Rule 29 does not apply.

October 4, 1993

No. 92-1856



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

CITY OF LADUE, EDITH J. SPINK, MAYOR OF THE CITY  
OF LADUE, THOMAS R. REMINGTON, GEORGE L.  
HENSLEY, GALE F. JOHNSTON, JR., ROBERT A. WOOD,  
ROBERT D. MUDD, JOYCE T. MERRILL, AS MEMBERS  
OF THE CITY COUNCIL OF THE CITY OF LADUE,

*Petitioners,*

v.

MARGARET P. GILLES,

*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Eighth Circuit

BRIEF FOR THE PETITIONERS

JORDAN B. CHERRICK  
Counsel of Record  
ROBERT F. SCHLAFLY  
JAY A. SUMMERVILLE  
ARMSTRONG, TEASDALE,  
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## QUESTIONS PRESENTED

1. Whether the Court of Appeals erroneously held, in conflict with the reasoning of *City of Cincinnati v. Discovery Network, Inc.*, — U.S. —, 113 S. Ct. 1505 (1993), that the City of Ladue's sign ordinance is content-based in violation of the First Amendment because it allows limited exceptions to its prohibition of noncommercial and commercial signs, even though it is undisputed that the content-neutral legislative purpose of the exceptions and of the ordinance as a whole is to prohibit only those signs which, by their function or location, are most likely to proliferate, cause visual blight, diminish the value of real estate, or create safety hazards.

2. Whether, by relying on the plurality opinion in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), which is in conflict with the reasoning of *City of Cincinnati v. Discovery Network, Inc.*, — U.S. —, 113 S. Ct. 1505 (1993), the Court of Appeals mistakenly assumed that noncommercial speech deserves greater First Amendment protection than commercial speech and, as a result, erroneously held that the limited exceptions in the City of Ladue's sign ordinance favor commercial speech over noncommercial speech, rendering the ordinance unconstitutional.

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## BRIEF FOR THE PETITIONERS

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### OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-8a) is reported at 986 F.2d 1180 (8th Cir. 1993). The opinions of the District Court (Pet. App. 11a-31a) are reported at 774 F. Supp. 1559-1568 (E.D. Mo. 1991).

### JURISDICTION

The judgment of the Court of Appeals was entered on February 22, 1993, the date the court's opinion was filed. Pet. App. 1a. On May 4, 1993, the Eighth Circuit amended its opinion by substituting three new pages from its original opinion to correct technical errors. Neither party filed a petition for rehearing. The petition for a writ of certiorari was filed on May 21, 1993, and was granted on October 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in part: "Congress shall make no law \* \* \* abridging the freedom of speech \* \* \*."

The City of Ladue's sign ordinance, enacted on January 21, 1991, and amended on February 25, 1991, will be referred to as "New Chapter 35" or the "sign ordinance" of the Code of the City of Ladue.<sup>1</sup> New Chapter 35 is reproduced in its entirety in the Joint Appendix, pages 116-131. *See also* Pet. App. 35a-50a.

### STATEMENT

The question presented in this case is whether the City of Ladue, a small and principally residential community,

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<sup>1</sup> On January 21, 1991, the City of Ladue (hereinafter "Ladue") repealed the then-existing Chapter 35 of the City Code relating to signs. The parties have referred to Ladue's predecessor sign ordinance as "Old Chapter 35."



has the right to protect the quality of life of its residents by prohibiting noncommercial and commercial signs that proliferate, cause visual blight, diminish the value of real estate, or create safety hazards.

### **I. Ladue's Sign Ordinance.**

Ladue's sign ordinance generally prohibits all signs within Ladue. J.A. 121, New Chapter 35, § 35-2. The ordinance permits a limited number of noncommercial and commercial signs which "either contribute substantially to the public safety and welfare or, because of their limited number, location, and size, do not substantially impinge upon the City of Ladue's interests in privacy, aesthetics, safety and maintenance of property values so as to necessitate a total ban of all signs." J.A. 119, New Chapter 35, "Declaration of Findings, Policies, Interests, and Purposes."

The limited number of exceptions to Ladue's prohibition of signs include the following:

municipal signs, subdivision and residence identification signs, road signs and driveway signs for danger, direction, or identification, health inspection signs, signs for churches, religious institutions, and schools, identification signs for not-for-profit organizations, signs identifying the location of public transportation stops, signs advertising the sale or rental of real property, commercial signs in the commercially zoned districts (1% of the total acreage of Ladue) and in the industrial zoned districts (2% of the total acreage of Ladue), and signs identifying safety hazards.

J.A. at 121-122, New Chapter 35, § 35-4.

Ladue's sign ordinance does not favor the content of any particular viewpoint expressed through a sign. Political, nonpolitical, controversial, and noncontroversial signs are all prohibited under Ladue's ordinance. Signs "For Peace In The Persian Gulf" violate Ladue's ordinance as do signs that say, "Wage War In The Gulf—Kill Saddam Hussein." Signs that ask residents to "Vote for School Taxes" violate Ladue's ordinance as do signs that announce, "Celebrate Joe's Fortieth Birthday." In addition,

most commercial and noncommercial signs are prohibited. One may not advertise a "Bake Sale" or "School Picnic" in residential neighborhoods. None of these signs is prohibited because of the content of its message. All of these signs are prohibited because the proliferation of signs in Ladue and the resulting blight offend the City's significant interests in aesthetics, safety, and the maintenance of real estate values. J.A. 116-119, New Chapter 35, "Declaration of Findings, Policies, Interests, and Purposes."

### **II. Ladue's Comprehensive Commitment To Preserving The Natural Beauty Of Its Community.**

Ladue is a small and predominantly residential community of approximately 8.5 square miles. J.A. 116. Limited areas of Ladue have been zoned for commercial or industrial use. *Id.* Malcolm C. Drummond, a professional city planner and national expert in the field of municipal zoning regulations and land-use, and the Honorable Edith J. Spink, Mayor of the City of Ladue, prepared detailed affidavits describing Ladue's longstanding and comprehensive interests in maintaining aesthetic, privacy, safety, and real estate values. J.A. 138-159, Drummond Aff., J.A. 161-183, Spink Aff.

Drummond's testimony underscores the strength of Ladue's comprehensive commitment to the beautification of its City:

Since its inception [in 1936], Ladue has made extraordinary and consistent efforts to preserve and enhance the aesthetic quality of its environment; to my personal observation, Ladue has made more sustained and consistent efforts in this regard than any other municipality which I have professionally advised, or with which I have been professionally associated, bar none; \* \* \*.

J.A. 147, Drummond Aff. ¶ 41.

#### **A. Ladue's Unique Aesthetic Ambience.**

Ladue has a unique and special heritage, with historical antecedents to settlements in the early nineteenth century.

J.A. 141-144, Drummond Aff. ¶¶ 19-22, J.A. 163-165, Spink Aff. ¶¶ 18-23. The City has a "rich inventory of buildings of special historical and/or architectural significance." J.A. 141-142, Drummond Aff. ¶ 19. *See also* J.A. 141-144, Drummond Aff. ¶¶ 18-26 & Exs. B and C (historic buildings surveys of the eastern and central portions of Ladue), J.A. 163-165, Spink Aff. ¶¶ 20-24.

Malcolm Drummond summarized his opinion of Ladue's unique ambience as follows:

The large lot sizes and low building density have allowed for the maintenance of large areas of plant materials, woods, streams and open areas which make Ladue unique in the Midwest; I have done professional work for such midwestern cities as Indianapolis, Detroit, Cleveland, Chicago, Minneapolis, Omaha, Kansas City, Memphis, Dallas and Houston and, while each has lovely residential suburbs, in my opinion none has any suburb which can compare with Ladue in its aesthetic ambience and privacy or in the charm and visual quality it has been able to maintain through preservation of its low density, rustic, heavily-wooded, uncluttered and open appearance; \* \* \*.

J.A. 149-150, Drummond Aff. ¶ 56. *See also* J.A. 171, 184, Spink Aff. ¶ 51, Ex. A (aerial photograph of Ladue showing abundance of trees throughout the City).

A principal reason for Ladue's special ambience is the City's zoning and land-use regulations and Ladue's strong adherence to its original Comprehensive City Plan. J.A. 151, Drummond Aff. ¶¶ 62-64, J.A. 173, Spink Aff. ¶¶ 67-68.

Ladue established an Architectural Review Board in 1940 to preserve the City's aesthetic and visual harmony by carefully regulating all architectural changes. J.A. 147, Drummond Aff. ¶ 44, J.A. 170, Spink Aff. ¶ 47. All applications for building permits that affect the appearance of a building must be approved by this Board. J.A. 147, Drummond Aff. ¶ 44, J.A. 170, Spink Aff. ¶ 47.

Ladue organized a Civic Improvement Committee in the late 1940's to "foster and encourage the beautification and aesthetic improvement of all public and semi-public areas \* \* \*." J.A. 176, Spink Aff. ¶ 81, J.A. 153-154, Drummond Aff. ¶¶ 75-76. This Committee, which has been continuously active since its inception, has facilitated and planned the planting and maintenance of trees, shrubs, and flowers throughout the City. J.A. 184 (aerial photograph of Ladue), J.A. 176-178, Spink Aff. ¶¶ 81-83 & Ex. D (copies of the minutes and activities summaries of the Civic Improvements Committee from 1970 through 1990) & Exs. E-S (photographs of various beautification projects, 1983 to present), J.A. 153-154, Drummond Aff. ¶¶ 75-76.

The City has improved the aesthetic quality of its principal commercial area through the creation of the Special Business District. J.A. 151-153, Drummond Aff. ¶¶ 65-74 & Ex. J (Study and Recommendation for Special Business District, 1982), Ex. K (color rendering of the 1982-1983 Special Business District Improvements), Ex. L (blueprint for the 1982-1983 Special Business District Improvements), Exs. M-P (photographs of Special Business District before the 1982-1983 improvements), Exs. O-T (Photographs of Special Business District after the 1982-1983 improvements), and J.A. 174-176, Spink Aff. ¶¶ 70-80. As a result of the substantial beautification efforts in the Special Business District, Ladue received the Governor's Town Treescape Award in 1984 from then-Missouri Governor Christopher Bond. J.A. 176, Spink Aff. ¶ 79 & Drummond Ex. U (Governor's Town Treescape Award of 1984), J.A. 153, Drummond Aff. ¶ 73.

Malcolm Drummond concluded that Ladue's "intense public interest in maintaining exceptionally high aesthetic and environmental standards is demonstrated by long standing and continuous efforts by both the City and private organizations to upgrade, improve and beautify all areas visible to the public." J.A. 153, Drummond Aff. ¶ 74. *See also* J.A. 176, Spink Aff. ¶ 80.

**B. Ladue Has Consistently Protected The Special Character Of Its Beautiful Residential Neighborhoods.**

Since its incorporation as a City in 1936, Ladue has made an extraordinary commitment to careful planning and zoning. Ladue has codified its zoning and land-use restrictions and has diligently enforced its comprehensive regulations to preserve the aesthetic and private qualities of Ladue's residential community. J.A. 145-150, Drummond Aff. ¶¶ 32-57, Ex. F (copy of Ladue's Zoning Ordinance), Ex. G (copy of Ladue's zoning map), J.A. 160, Drummond Aff. Ex. H (color map of Ladue showing residential areas in green and nonresidential areas in pink and blue), J.A. 166-172, Spink Aff. ¶¶ 32-62.

Ladue's original Comprehensive City Plan was prepared by the renowned city planner, Harland Bartholomew, who is well known for his work in restoring the historic colonial city of Williamsburg, Virginia. J.A. 144, Drummond Aff. ¶ 29, Ex. E (highlights of Bartholomew's professional career), J.A. 144, Drummond Aff. ¶ 28 & Ex. D (Harland Bartholomew's "A Preliminary Report Upon a City Plan, City of Ladue, Missouri" submitted to Ladue City Council in March, 1939), J.A. 166, Spink Aff. ¶ 30. Drummond observed that Ladue "has been both consistent and unwavering in disapproving any architectural, aesthetic, zoning, or land use changes which would [be] out of keeping with the original vision set out by Harland Bartholomew." J.A. 144-145, Drummond Aff. ¶ 31. See also J.A. 166-167, Spink Aff. ¶ 32.

Ladue's commitment to strict zoning regulations is reflected in its successful defense of its land-use ordinances for almost forty years. J.A. 145-146, Drummond Aff. ¶ 38 (collecting reported cases), J.A. 168-169, Spink Aff. ¶ 10 (same).

**III. Signs Will Proliferate And Create Visual Blight If Ladue Is Not Permitted To Limit The Number And Location Of Noncommercial And Commercial Signs.**

Ladue has maintained strict regulations of signs since the formation of the City. J.A. 156-157, Drummond Aff. ¶¶ 92-93 & Exs. V-Z (zoning ordinances of the three predecessor villages to Ladue) and Exs. AA-JJ (Ladue's sign ordinances and their amendments from 1959 through present), J.A. 179, Spink Aff. ¶¶ 89-91. Drummond opined that the "careful regulation of signage is an essential element of city planning" and the "location, existence and design of signage in a community directly affect the visual and aesthetic appeal \* \* \*." J.A. 154, Drummond Aff. ¶ 77. Drummond also stated that Ladue's regulation of signs has fostered its interests in privacy, aesthetics, safety, and maintenance of real estate values. J.A. 156, Drummond Aff. ¶ 91. See also J.A. at 179, Spink Aff. ¶ 89.

Drummond opined that "[i]t is a basic and accepted principle of urban planning, and a principle which I hold to be fundamental, that a proliferation of signs causes visual blight." J.A. 155, Drummond Aff. ¶ 82. Based upon his many years of professional experience, Drummond testified that the failure to regulate signs in Ladue will create a serious proliferation problem, which already exists in many municipalities in St. Louis County. J.A. 154-156, Drummond Aff. ¶¶ 78-90. See also J.A. 178-180, Spink Aff. ¶¶ 86-94, J.A. 197-198, Spink Supp. Aff. (additional factual support for Drummond's findings). Drummond testified that those cities in the St. Louis area that have chosen not to regulate signage strictly have suffered the consequences of proliferation and visual blight. J.A. 154-155, Drummond Aff. ¶¶ 81-82. As Drummond observed:

Based upon my personal knowledge and experience, many municipalities in St. Louis County which do not strictly limit the erection of signs frequently experience a proliferation of yard signs and placards and temporary public signs in the public rights-of-



way; this is true especially in the campaigns before municipal, primary, or general elections but such proliferation can and often does occur at other times as well; I have observed such proliferation in Ferguson, Webster Groves, St. Ann, Berkeley, Manchester and Ellisville, which are all cities in the St. Louis metropolitan area which I have served as a Planner.

J.A. 154-155, Drummond Aff. ¶ 81.

Drummond analyzed and evaluated the impact of New Chapter 35 on Ladue. J.A. 157, Drummond Aff. ¶ 94. Based upon his education, training, background, and professional experience, Drummond stated that the regulations and policies contained in the ordinance promote the "City's interests in aesthetic excellence, privacy, maintenance of property values and safety, which have been the City's guiding zoning, land use and sign regulatory principles." J.A. 157-158, Drummond Aff. ¶ 97. *See also* J.A. 157, Drummond Aff. ¶¶ 94-96.

#### **IV. Respondent's Signs Are Not Permitted Under The General Prohibition Of Signs Contained In Ladue's Ordinance.**

Respondent resides on Willow Hill Lane, in the Willow Hill subdivision of Ladue. J.A. 181-182, Spink Aff. at ¶¶ 99, 101, 103. Willow Hill Lane is typical of most of Ladue's 207 private subdivision streets. J.A. 173, Spink Aff. at ¶¶ 65, 66. The street is privately owned and maintained by the trustees of the subdivision and governed by a trust indenture containing restrictions on the use of one's real estate. J.A. 182, Spink Aff. ¶¶ 100-101. While Willow Hill is "country-like, charming and private," it is also extremely narrow and winding and lacks adjacent sidewalks. J.A. 173, Spink Aff. ¶ 65.

Respondent has maintained signs in her front yard and on one of her home's windows facing the street. Pet. App. 22a (District Court opinion), Pet. App. 3a (Eighth Circuit opinion). These signs contained the messages, "Say No To War In The Persian Gulf Call Congress Now," and "For Peace In The Gulf." *Id.* Respondent's

signs are not permitted under Ladue's sign ordinance. J.A. 121, New Chapter 35, § 35-2.

#### **V. Proceedings In The Lower Courts.**

Respondent filed a Complaint against Ladue pursuant to 42 U.S.C. § 1983 in which she challenged the constitutionality of Ladue's sign ordinance under the First Amendment of the United States Constitution. Respondent sought injunctive relief to prevent Ladue from enforcing its sign ordinance.

The parties filed cross-motions for summary judgment. In support of its motion, Ladue filed an extensive evidentiary record consisting of the affidavits of Malcolm C. Drummond and Mayor Edith J. Spink. J.A. 138-159, Drummond Aff., J.A. 161-183, Spink Aff. Ladue and its affiants filed seventy exhibits in support of the constitutionality of Ladue's sign ordinance.

During the many months in which this case was pending in the District Court, respondent did not introduce any expert testimony that conflicted with the facts and opinions contained in Drummond's and Spink's affidavits. The only evidence respondent introduced into the summary judgment record was an affidavit by Nancy R. Sachs, a resident of Ladue, and several photographs of respondent's signs. J.A. 190-193, Sachs Aff. & J.A. 194-195 (copies of photographs). Sachs did not claim to have any professional qualifications, or experience in urban planning, land-use, municipal government, or in the planning or administration of the City of Ladue. J.A. 190, Aff. ¶ 1.

The record demonstrates that Ladue has consistently "applied" its current and predecessor sign ordinances in a constitutional fashion. Respondent offered no evidence that suggests any discriminatory enforcement of Ladue's sign ordinances since the City was founded.

The District Court granted respondent's and denied Ladue's motion for summary judgment. Pet. App. 11a-21a. The court held that Ladue's sign ordinance "on its face" violated the First Amendment, and permanently enjoined

Ladue from enforcing its sign ordinance.<sup>2</sup> Pet. App. 16a-21a, 31a. The Eighth Circuit affirmed the District Court's judgment on the merits. Pet. App. 1a-8a. Neither the Eighth Circuit nor the District Court, however, mentioned the significance of Ladue's exhaustive evidentiary record in support of its sign ordinance. J.A. 1a-8a (Eighth Circuit opinion); 11a-31a (District Court opinion).

The Eighth Circuit acknowledged that "Ladue's interests in enacting its ordinance are substantial." Pet. App. 7a. The Court also recognized that the ordinance is "viewpoint neutral." Pet. App. 4a n.5. Nevertheless, relying on the plurality opinion in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the Court of Appeals agreed with the District Court and held that the limited exceptions to Ladue's general prohibition of signs indicated that "Ladue's ordinance violates the First Amendment by favoring commercial speech over non-commercial speech and by favoring certain types of non-commercial speech over others." Pet. App. 8a (Eighth Circuit opinion); Pet. App. 31a (District Court opinion).

The District Court and the Eighth Circuit each granted respondent a substantial award for attorneys' fees and expenses pursuant to 42 U.S.C. § 1988.<sup>3</sup>

<sup>2</sup> Although Ladue's sign ordinance has a severability clause, the District Court effectively refused to enforce it by enjoining § 35-2, which prohibits all signs, as well as § 35-4, which allows limited exceptions to the general prohibition against signs. J.A. 121, 122. The severability clause provides that if any of the "sections, paragraphs, clauses, and phrases" of the sign ordinance are declared invalid, the remaining provisions of the ordinance shall be effective. J.A. 130-131, New Chapter 35, § 35-24. Severability clauses in municipal ordinances are valid and enforceable under Missouri law. *Pearson v. City of Washington*, 439 S.W.2d 756, 762 (Mo. 1969).

<sup>3</sup> After receiving "demand" letters from respondent's attorneys for payment of her attorneys' fees and expenses, Ladue was compelled to pay these awards in full. If, however, this Court reverses the Eighth Circuit's judgment, respondent will have no right to payment of any attorneys' fees and expenses under 42 U.S.C.

## SUMMARY OF ARGUMENT

The City of Ladue is a small, residential community of 8.5 square miles that is filled with beautiful landscapes and natural settings. The protection of the natural beauty and environment of the City is one of the hallmark values that Ladue has nourished since it was founded in 1936. The uncontested record in the District Court establishes that Ladue has made a comprehensive commitment to aesthetics evidenced not only by its regulation of signs but also by its zoning laws and numerous beautification projects.

1. Ladue's sign ordinance satisfies the test under which this Court traditionally reviews reasonable regulations of the "time, place, or manner" of speech on public and private property. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (public property); *Barnes v. Glen Theatre, Inc.*, — U.S. —, 111 S. Ct. 2456, 2460 (1991) (private property).

First, the ordinance is content-neutral because its significant governmental purposes—prevention of visual blight, privacy, safety, the preservation of real estate values—are unrelated to the content of the speech on the signs. Visual blight created on public and private property is a nuisance that is traditionally subject to the government's regulatory and police powers.

Second, the ordinance is narrowly tailored because it directly and effectively remedies the problems that the ordinance was designed to prevent. The summary judgment record is undisputed that without its sign ordinance, Ladue would suffer from the proliferation of signs and resulting visual blight that exist in some of Ladue's neighboring cities.

As the Court observed in *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466

§ 1988. Under these circumstances, respondent and her attorneys must immediately return all attorneys' fees, expenses, and accrued interest to Ladue.

U.S. 789 (1984), "the substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself." *Id.* at 810. Thus, "[b]y banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy." *Id.* at 808.

Third, Ladue's ordinance does not jeopardize a person's freedom of speech because alternative and ample modes of expression are available other than the medium of signs. The record is undisputed that Ladue's sign ordinance does not affect any individual's right to communicate through numerous modes of speech including letters, flyers, telephone calls, bumper stickers, newspaper advertisements, and speeches. In *Vincent*, 466 U.S. at 812-13, this Court rejected the notion that noncommercial and political signs were a "uniquely valuable or important mode of communication" that demand absolute protection regardless of the ill effects of sign proliferation.

Respondent challenged Ladue's sign ordinance because it prevented her from erecting noncommercial and political signs on her property. Ladue is not concerned with the content of respondent's signs; it is concerned with the visual blight caused by the proliferation of signs throughout the City.

If the First Amendment is interpreted to prevent Ladue from legislating to prevent the proliferation of signs, its residents would be compelled to suffer the evils of visual blight that already plague so many areas of the nation. Federal, State and local governmental authorities would lose the right to prevent individuals from erecting an unlimited number of noncommercial and commercial signs—from political graffiti to business advertisements—in the private and public areas of the nation's cities, towns, streets, highways, parks, scenic attractions, and residential communities. As this Court observed in *Ward*, 491 U.S. at 801, "[t]he validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case."

2. The lower courts erroneously relied on the plurality's implied discrimination theory in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), which is distinguishable but, in any event, has been rejected by a majority of the Court. The Eighth Circuit and the District Court held that Ladue's sign ordinance violated the First Amendment because it discriminated against speech by permitting limited exceptions to its general prohibition of signs.

The courts below, however, ignored the text of the sign ordinance and the uncontested evidentiary record that explain Ladue's content-neutral justification for the limited exceptions in the ordinance. The ordinance only permits those signs which are necessary for the public's safety, or which, by their function or location, will not proliferate and cause visual blight.

The plurality's implied discrimination theory should be rejected because it places Ladue and other cities in a "Catch 22" position. The lower courts have overturned Ladue's sign ordinance because it permits exceptions to its total ban of signs. Yet, if Ladue were realistically able to ban all signs (which it is not), such an ordinance would be unconstitutional because it would be overbroad by banning signs that do not proliferate and cause visual blight or other problems. By carefully permitting exceptions to its ordinance, Ladue is protecting First Amendment interests by allowing as much speech as possible through the medium of signs consistent with the valid objective of the ordinance.

The strength of Ladue's case is evidenced by its ability to satisfy the strict test established by Justice Brennan in his concurring opinion in *Metromedia*. Justice Brennan, who was joined by Justice Blackmun, criticized the *Metromedia* plurality's implied discrimination theory. These Justices concurred in the Court's judgment but expressly rejected the "all or nothing" approach of the plurality. Indeed, in his concurring opinion, Justice Brennan went so far as to characterize the plurality's view as "mak-



[ing] little sense.” 453 U.S. at 532 n.10 (Brennan, J., concurring, joined by Blackmun, J.).

Justices Brennan and Blackmun would permit a city’s prohibition of signs with narrowly tailored, content-based exceptions. 453 U.S. at 532, 533 & n.10. Before upholding such a prohibition, however, Justices Brennan and Blackmun would require the municipality to make a record that it is “seriously and comprehensively addressing aesthetic concerns.” 453 U.S. at 531.

Justices Brennan and Blackmun concluded that they had “little doubt” that some cities—such as the historic community of Williamsburg, Virginia—could prove the substantiality of their interest in aesthetics. 453 U.S. at 534. The City of Ladue is precisely the type of unique community—dedicated to furthering the goals of aesthetics and safety—that can meet Justice Brennan’s strict constitutional standards under which a prohibition on signs with narrowly tailored exceptions would be permitted.

3. Ladue’s right to regulate sign proliferation is strengthened because of the importance of aesthetics in the private, residential neighborhoods, that form most of the small community of Ladue. Ladue has an important interest in protecting the privacy of all of the residential areas of Ladue from visual blight caused by the proliferation of signs.

Ladue’s right to abate the nuisance of visual blight is particularly strong when one considers that its residents are “captive” to the eye sores created by signs that multiply through their neighborhoods. As Justice Brandeis observed for the Court in *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932), “[t]he radio can be turned off, but not so the billboard or street car placard.” Signs continuously intrude on one’s ability to enjoy the natural beauty of one’s city. Ladue, therefore, should be allowed to prevent the proliferation of signs that threaten the aesthetic values that the City has maintained throughout its history.

## ARGUMENT

### I. LADUE’S SIGN ORDINANCE SATISFIES THIS COURT’S TEST THAT PERMITS REASONABLE “TIME, PLACE, OR MANNER” REGULATIONS OF SPEECH ON PUBLIC AND PRIVATE PROPERTY.

In *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), the Court held that one’s right to free speech must yield to the government’s reasonable “time, place, or manner” regulations of speech when three conditions are met:

1. The regulations are “justified without reference to the content of the regulated speech.” *Id.* (quoting *Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 293 (1984) (emphasis added in *Ward*));
2. The regulations are “narrowly tailored to serve a significant governmental interest.” *Id.*; and
3. The regulations “leave open ample alternative channels for communication of the information.” *Id.*

*Ward* involved New York City’s regulation of loud and disturbing sound caused by musical concerts in Central Park. *Id.* In *Barnes v. Glen Theatre, Inc.*, — U.S. —, 111 S. Ct. 2456, 2460 (1991), the Court applied the “time, place, or manner” test to “conduct occurring on private property.”

The “time, place, or manner” test is appropriate because Ladue’s sign ordinance involves the regulation of signs and not a total ban on signs. Noncommercial and commercial signs are permitted if they do not proliferate or affect safety. In addition, Ladue’s sign ordinance only regulates one medium of speech: signs. Numerous other modes of speech are available for people to express themselves.

Ladue’s New Chapter 35 satisfies each of the Supreme Court’s three conditions described in *Ward*. The lower

courts erred by misinterpreting *Ward* and misapplying its test to Ladue's sign ordinance.

**A. This Court Should Apply The Test In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), To Ladue's Sign Ordinance, Which Is Designed To Prevent Visual Blight Caused By A Proliferation Of Signs.**

This case involves the unique regulatory problems that local, State, and federal governmental authorities face when they seek to eliminate visual blight and other evils caused by the proliferation of signs. An accepted principle of First Amendment speech jurisprudence is that each manner of expression is "a law unto itself" and reflects its own "differing natures, values, abuses and dangers." *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring). See also *FCC v. Pacific Foundation*, 438 U.S. 726, 748 (1978); *R.A.V. v. City of St. Paul*, — U.S. —, 112 S. Ct. 2538, 2568 (1992) (Stevens, J., dissenting).

*Members of the City Council of the City of Los Angeles v. Vincent*, 466 U.S. 789 (1984), is the seminal case in which this Court applied the "time, place, or manner" test to the unique context of a city's sign regulation designed to prevent visual blight. In *Vincent*, the Court upheld Los Angeles' ordinance that prohibited the posting of signs, including those containing political messages, on public property. 466 U.S. at 807-810, 816-817. The ordinance had been applied to prohibit signs on utility poles. *Id.* The *Vincent* Court evaluated Los Angeles' sign ordinance based on the legal test announced in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *Vincent*, 466 U.S. at 804-805. In *Barnes*, the Court characterized the *O'Brien* test as "embody[ing] much the same standards" as the "time, place, or manner" test described in *Ward*. *Barnes*, 111 S. Ct. at 2460. See also *R.A.V.*, 112 S. Ct. 2544.

The Court's central thesis in *Vincent* is that "the substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of

expression itself." *Vincent*, 466 U.S. at 810. Thus, "[b]y banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy." 466 U.S. at 808. Ladue will demonstrate that its sign ordinance is constitutional under the Court's analysis in *Vincent*, *Ward*, *R.A.V.*, and *City of Cincinnati v. Discovery Network, Inc.*, — U.S. —, 113 S. Ct. 1505 (1993).

**B. This Court Has Held That Aesthetics, Privacy, Safety, And The Maintenance Of Real Estate Values Are Significant Governmental Interests That Cities May Protect.**

Ladue's interests in aesthetics, privacy, safety, and the maintenance of real estate values "justify" the regulation of signs contained in its sign ordinance. J.A. 116-119, New Chapter 35, Article I. This Court has held that each of these purposes of legislative action is a significant governmental interest that supports reasonable regulation by federal, State, or local laws. *Vincent*, 466 U.S. at 817. See also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion); *State v. Hodgkiss*, 565 A.2d 1059, 1064, 1065 (N.H. 1989) (opinion of Souter, J.) (upholding constitutionality of city ordinance that prohibited signs that caused "visual defilement" of public property; ordinance furthered "substantial public interest in preventing visual assault by an accumulation of signs on public property").

The *Vincent* Court recognized that proliferation of signs would likely develop in a city that does not regulate the number of permitted signs. 466 U.S. at 817 (If signs were permitted to remain, they "would encourage others to post additional signs \* \* \*"). The Court acknowledged the adverse effect on the "quality of life" and the "value of property" created by the proliferation of signs. *Id.* (The city's "interests are both psychological and economic. The character of the environment affects the quality of life and value of property in both residential and commercial areas."). Ladue, therefore, has the right to prevent the proliferation of signs and the resulting



visual blight that plague many municipalities of St. Louis County as well as many cities throughout the country. J.A. 154-155, Drummond Aff. ¶¶ 79-81, J.A. 178-179, Spink Aff. ¶¶ 86-88.

### C. Ladue's Sign Ordinance Is Content-Neutral.

The Court in *Ward* defined the meaning of a "content-neutral" governmental regulation as follows: "[t]he government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others [citation omitted]. Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'" 491 U.S. at 791 (quoting *Community For Creative Non-Violence*, 468 U.S. at 293 (emphasis added in *Ward*)).

Ladue's sign ordinance is "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791. The ordinance contains a detailed legislative declaration of "Findings, Policies, Interests, and Purposes," which demonstrate Ladue's comprehensive commitment to the beautification of its City since it was formed in 1936. J.A. 116-119. The declaration explains the content-neutral reasons for Ladue's decision to prohibit all signs with the limited exception of those that do not proliferate or affect safety. *Id.*

The purposes of the ordinance are supported by the uncontested affidavit of Malcolm C. Drummond, a nationally renowned land-use expert. Drummond testified that if Ladue had not enacted New Chapter 35, signs would proliferate in the City and create visual blight, safety problems, and a deterioration of real estate values. J.A. 154-155, Drummond Aff. ¶¶ 77-90.

The courts below misunderstood and misapplied this Court's holding in *Ward*. The District Court attempted to distinguish *Ward* as follows: "Unlike the regulation in *Ward* that sought only to regulate the volume of the protected speech, not the content or even the specific

mix of the music, New Chapter 35 specifically looks to the content to identify exceptions to a general prohibition of all signs." Pet. App. 16a.

The District Court's opinion is contradicted by this Court's analysis in *Ward*. The Court acknowledged that volume is part of the content of musical expression and indeed is a key component of one's First Amendment right to express rock music. 491 U.S. at 786 n.1. Even though New York City's ordinance restricted a rock musician's First Amendment right by allowing the City's sound technician to regulate the volume of the music, the Court upheld the ordinance because it was justified by the content-neutral reason of maintaining a quiet environment in nearby residential neighborhoods. *Id.* at 792.

The Eighth Circuit confused *Ward's* analysis of "content-neutrality" with the "secondary effects" doctrine, which permits certain content-based regulations of speech. Pet. App. 5a-6a. See *R.A.V.*, 112 S. Ct. at 2546; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986).

The Court of Appeals erred further in ignoring this Court's holding in *R.A.V.*, 112 S. Ct. at 2545-2546 (1992). There, the Court stated that the central principle underlying its First Amendment doctrine is that the government may not proscribe speech "because of disapproval of the ideas expressed." *Id.* at 2542 (emphasis added). An important corollary of this doctrine is that the government may proscribe speech for significant reasons that are unrelated to the content of speech. *Id.* at 2544, 2547.

The Court in *R.A.V.* explained that the government has the power to regulate a noncontent element of speech. 112 S. Ct. at 2544. A "noisy sound truck," therefore, is "as Justice Frankfurter recognized, a 'mode of speech,'" that does not have a "claim upon the First Amendment." *Id.* at 2545 (citation omitted).<sup>4</sup> Ladue's regulation of

<sup>4</sup> Justice Stevens agreed with the majority on this issue. He observed that "[i]t is true that loud speech in favor of the Republi-



the medium of signs is permissible because it furthers the government's content-neutral purpose of preventing the nuisance of "visual noise" created by sign proliferation. See *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (plurality opinion) (affirming validity of ordinance banning sound trucks based upon individual's right of privacy and right to be free from loud noise), 366 U.S. at 96-97 (Frankfurter, J., concurring) (same), 366 U.S. at 97 (Jackson, J., concurring) (same).

Consistent with the principles of content-neutrality explained in *Ward* and *R.A.V.*, the Court in *Discovery Network* stated that a city must establish a "neutral justification" to support the constitutionality of an ordinance designed to prevent visual blight caused by too many newsracks. 113 S.Ct. at 1515, 1517. Sign proliferation causing visual blight and safety problems are content-neutral reasons that justify Ladue's ordinance.

Respondent attempted to contest the neutral justification for Ladue's sign ordinance by filing the affidavit of Nancy Sachs, a Ladue resident who feels that even if New Chapter 35 did not exist, signs would not proliferate in the City. J.A. 190-192, Sachs Aff. This Court should disregard Sachs' inadmissible and legally irrelevant affidavit.

Fed. R. Civ. P. 56(e) states that affidavits "shall show affirmatively that the affiant is competent to testify to the matters stated therein." An affidavit must be based upon admissible evidence and not upon conjecture. *Id.* In reviewing an expert's affidavit, the Court must apply the Federal Rules of Evidence to determine whether the contents of the affidavit would be admissible at trial. See, e.g., *Washington v. Armstrong World Industries, Inc.*, 839 F.2d 1121, 1123-1124 (5th Cir. 1988). Applying these

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can Party can be regulated because it is loud, but not because it is pro-Republican; and it is true that the public burning of the American flag can be regulated because it involves public burning and not because it involves the flag." *R.A.V.*, 112 S. Ct. at 2562 (Stevens, J., dissenting).

standards to Sachs' affidavit, this Court should refuse to consider the affidavit based upon Fed. R. Evid. 702 and 703 (requiring an expert to be qualified and to base opinion on data reasonably relied upon by experts). Sachs does not claim to have any expertise or experience in land-use, city planning, or municipal government. J.A. 190-192, Sachs Aff.

If this Court were to consider Sachs' affidavit, it does not establish respondent's right to a summary judgment. In reviewing the grant of summary judgment to respondent, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The lower courts, therefore, were required to accept as true the facts and opinions contained in Drummond's and Spink's affidavits, which support the constitutionality of Ladue's sign ordinance.

Furthermore, the lower courts erred in not holding that Ladue is entitled to summary judgment. Sachs does not contest any of the facts established by Drummond and Spink that the proliferation of signs and the resulting visual blight have occurred in many cities near Ladue. In addition, Sachs' affidavit does not create a factual dispute that is outcome-determinative under the controlling law of *Vincent*, *Renton*, and *Ward*. See *Anderson*, 477 U.S. at 251-255 (summary judgment should be granted if nonmovant's evidence is "of insufficient caliber or quantity" to create a factual dispute). The opinion of a single resident of Ladue cannot be permitted to upset the considered judgment of a city's legislative body. *Ward*, 491 U.S. at 800-801.

An additional example of respondent's effort to inject legally irrelevant material into this case involves her interpretation of some testimony on Ladue's predecessor sign ordinance that has been repealed and is not at issue before this Court. J.A. 26-37, Old Chapter 35 (repealed January 21, 1991). The dispute concerns the answers of Mayor Spink and Councilman Remington to hypothetical

questions about the "variance clause" in Ladue's predecessor sign ordinance. J.A. 28, Old Chapter 35, § 35-5. Respondent interpreted the variance clause to give the City Council discretion to permit signs based on their content. Even if one accepted respondent's interpretation of the clause, it is legally irrelevant because New Chapter 35, the sign ordinance at issue, repealed the variance provision in Old Chapter 35. In addition, Mayor Spink and Councilman Remington did not participate in the City Council's vote on New Chapter 35. J.A. 162, 180, 181, Spink Aff. ¶¶ 11-13, 95, 98.

Ladue's new sign ordinance does not give the members of the City Council, the Mayor, City officials, employees, or residents any discretion to permit signs based on their content. J.A. 116-131 (text of New Chapter 35). Furthermore, unlike Ladue's predecessor sign ordinance, Chapter I of New Chapter 35 contains a complete "Declaration of Findings, Policies, Interests, and Purposes" that explains the reasons for Ladue's general prohibition of signs and the City's justification for each of the limited exceptions. J.A. 116-119. Respondent should not be permitted to attack Ladue's new sign ordinance by offering her interpretation of the legally irrelevant testimony of Mayor Spink, Councilman Remington, Police Chief Dierberg, and Willow Hill residents Arnold and Gulick concerning their opinions of legislative purpose of Ladue's Old Chapter 35 that has been repealed.

The challenged testimony has no legal relevance to respondent's constitutional challenge of New Chapter 35, which is facially constitutional and, like all of Ladue's predecessor sign ordinances, has never been applied in an unconstitutional fashion. The Court has held that "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Moreover, the Court accepts the recitation of purposes contained in a municipal ordinance. *Frisby v. Schultz*, 487 U.S. 474, 477 (1988) (purpose of ordinance was reflected in its

text). This principle is particularly applicable when a city repeals a predecessor ordinance of questionable constitutional validity. *See id.* If the rule were otherwise, a city never could repeal old ordinances with the assurance that the courts would enforce the constitutionality of the new ordinance based on its text and the manner in which it is applied.

**D. The Exceptions In Ladue's Sign Ordinance Are Content-Neutral Because They Permit Only Those Signs Which Do Not Proliferate Or Which Affect Safety.**

Ladue's sign ordinance satisfies the ultimate test in *R.A.V.* that a governmental regulation is valid if it is not "conditioned upon the sovereign's agreement with what a speaker may intend to say." *R.A.V.*, 112 S. Ct. at 2547 (quoting *Metromedia*, 453 U.S. Ct. 555 (Stevens, J. dissenting in part) (citation omitted)). The exceptions contained in New Chapter 35 are not based on whether the City agrees or disagrees with the viewpoint, subject matter, or content of a sign's message.

While Ladue's sign ordinance generally prohibits the medium of signs, it allows as much speech as possible through signs without adversely affecting Ladue's significant governmental interests. Ladue's sensitivity to the right of free speech under the First Amendment is reflected in its narrowly tailored exceptions to its general prohibition of signs. J.A. 121-122, New Chapter 35, § 35-4.

All of the permitted signs (with the exception of residence identification and municipal signs<sup>5</sup> that are directly related to the protection of the public safety) are naturally limited in number. J.A. 116-119, New Chapter 35, Article I. Ladue is able to permit these signs for the content-neutral reason that their allowance and limited number would not result in proliferation contrary to the purpose of the ordinance. *Id.*

<sup>5</sup> Municipal signs, such as those that state "No Parking" or "Speed Limit: 20 Miles Per Hour," are enacted by the City to provide notice of applicable laws.



**E. The Lower Courts Relied On Portions Of The Plurality Opinion In *Metromedia v. City Of San Diego*, 453 U.S. 490 (1981), Which Conflict With This Court's Test For Determining Whether A Governmental Regulation Is Content-Neutral.**

The Eighth Circuit and the District Court relied on the plurality opinion in *Metromedia* in holding that Ladue's sign ordinance was unconstitutional. Pet. App. 3a-4a (Eighth Circuit opinion), Pet. App. 16a-17a, 25a-29a (District Court opinion). According to the courts below, the exceptions in Ladue's sign ordinance implicitly mean that "the city was improperly choosing the appropriate subjects for public debate." Pet. App. 4a (quoting *Metromedia*, 453 U.S. at 514-515)) (Eighth Circuit opinion), Pet. App. 26a (District Court opinion).

**1. The Lower Courts Erred In Concluding That Ladue's Sign Ordinance Discriminates In Favor Of Selected Types Of Commercial And Noncommercial Speech.**

The assumption underlying the *Metromedia* plurality's implied discrimination theory was that San Diego failed to explain the reason its decision to exclude some types of signs from its general prohibition of signs advanced its goals of aesthetics and safety. 453 U.S. at 513, 514 ("The city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city. \* \* \* No other commercial or ideological signs meeting the structural definition are permitted, regardless of their effect on traffic safety or esthetics.").

Ladue's sign ordinance is distinguishable from the San Diego ordinance that was criticized by the *Metromedia* plurality. Unlike San Diego's ordinance, Ladue's ordinance provides a sound and reasonable content-neutral explanation for its allowance of certain signs. Ladue only permits signs that do not proliferate because they are naturally limited in number, by function or location, or signs that protect the public safety.

The District Court failed to recognize that Ladue's sign ordinance is distinguishable in this respect from San Diego's billboard ordinance. The Court of Appeals appears to have rejected or misunderstood the neutral justification for Ladue's sign ordinance which was supported by a substantial uncontested evidentiary record filed in the summary judgment proceedings. See Pet. App. 5a-6a.

A careful analysis of the language in the Eighth Circuit's opinion discloses that the Eighth Circuit's position is erroneous as a matter of law. Pet. App. 5a-6a. In a footnote to the text of the opinion, the Eighth Circuit panel acknowledged Ladue's justification for its ordinance is to prohibit the proliferation of signs. ("According to Ladue, the ordinance excepts from the general ban only signs that are naturally limited in number or that are necessary to protect the safety of Ladue's residents."). Pet. App. 6a n.7. The court, nevertheless, concluded that Ladue "has failed to provide sufficient factual support for this proliferation rationale." *Id.*

The Eighth Circuit's first error of law was its failure to consider as a relevant factor the undisputed factual foundation for Ladue's nonproliferation justification for its ordinance. See J.A. 116-119. In addition, contrary to the well accepted law on the standard of review in summary judgment proceedings and "time, place, or manner" regulations of speech, the court, in effect, disregarded the uncontested affidavits of Malcolm Drummond and Mayor Spink as insufficient "factual support." These affidavits establish that there was a serious danger of sign proliferation which would upset Ladue's historic commitment to the beautification of its small, residential community. See *Vincent*, 466 U.S. at 795 (reversing the Court of Appeals' rejection of the "sufficiency" of the City's justification for its ban on signs).

By failing to discuss the evidentiary record supporting Ladue, the Eighth Circuit violated the standard of review under which the ordinance should be analyzed. In *Renton*, 475 U.S. at 51-52, the Court held that "[t]he



First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce new evidence of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." In *Ward*, 491 U.S. at 800, this Court further refined the standard of review by underscoring a court's duty to defer to a city's reasonable judgment as to the best way of protecting the welfare of its residents.

The Court's most significant legal error is its failure to recognize that each of the permitted signs is justified by the test of whether they "contribute substantially to the public safety and welfare or, because of their limited number, location, and size, do not substantially impinge upon the City of Ladue's interest in privacy, aesthetics, safety, and maintenance of property values so as to necessitate a total ban of all signs." J.A. 119, New Chapter 35, Declaration of Findings, Policies, Interests, and Purposes. An examination of the exceptions shows that the reasons for their allowance in each category satisfy a content-neutral purpose.

The District Court determined that Ladue's sign ordinance was unconstitutional because it permitted "for sale" and "for lease" signs. The court overlooked two content-neutral justifications for this exception stated in Article I of the sign ordinance. J.A. 110. First, Mo. Rev. Stat. § 67.317 (1986), requires municipalities to permit for sale and for lease signs. A city cannot be charged with discriminating in favor of signs required by state law. See *Metromedia*, 453 U.S. at 554 n.25 (Stevens, J., dissenting in part) (signs required by law are content-neutral because they are not based on the "subject matter of speech"). Second, the limited number of homes for sale or for lease at any given time prevent their proliferation. J.A. 118.

In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93-95 (1977), the Court overturned a municipal ordinance that banned for sale signs because

the City hoped to discourage white homeowners from leaving a racially integrated neighborhood. The Court concluded that the City was trying to suppress the message on the signs and was not genuinely concerned with the effect of signs on the aesthetics of the community. *Id.* at 93-94. The Court reserved the question of "whether a ban on signs or a limitation on the number of signs could survive constitutional scrutiny if it were unrelated to the suppression of free expression." *Id.* at 94 n.7.

Observing that signs are the ideal manner in which to communicate the sale of real estate, the Court stated that "serious questions exist as to whether the ordinance 'leave[s] open ample alternative channels for communication [citation omitted].'" *Id.* at 93. Ladue's ordinance is also justified on the grounds that it prohibits off-site signs that proliferate and permits on-site signs that are limited in number and are necessary to identify the premises or the activities conducted on the premises. Ladue's exception for real estate signs would be consistent with this content-neutral rationale because these signs directly relate to the ownership or occupancy function of the real estate on which the sign is located.

The Eighth Circuit concluded Ladue's sign ordinance was content-based because it permitted some commercial signs in districts zoned for commercial or industrial use and announcement signs at schools and churches. Pet. App. 6a n.7. The court overlooked the fact that these types of signs cannot proliferate because of the limited number of commercial businesses in the small areas of Ladue zoned for commercial and industrial use (3% of the entire geographic area), the site-specific function of the signs, and the relatively few schools and churches in the City.

Ladue interprets the exception for commercial signs in the areas zoned for commercial and industrial use to apply only to commercial signs that identify the premises or that are directly related to activities conducted on

the premises.<sup>6</sup> The word "commercial" is the technical term designating the zoning classification of property in the commercial and industrial zoning districts.

Ladue's zoning ordinance creates zoning districts that are either residential or nonresidential. J.A. 145, Drummond Aff. ¶ 33 Ex. F (Ladue's zoning ordinance, § III). The nonresidential zones are the small commercial and industrial districts. *Id.* The permitted uses for the commercial and industrial zones include offices and stores. *Id.*

A "commercial" sign, therefore, identifies the occupant or directly relates to the activity taking place on the property zoned for commercial and industrial use. For example, a store might have an identification sign, "Joe's Meat Market," and a functional sign, "Steaks on Sale." Similarly, an office might have an identification sign, "Washington for President Campaign Headquarters," and a functional sign, "Campaign Committee Meeting Here at 7:00 p.m." Neither the store nor the office, however, could have a noncommercial sign such as "Vote for NAFTA" or "Elect Washington on November 2nd," which is not either an identification of the occupant or of an activity taking place on the premises.

The Court of Appeals failed to consider the importance of the neutral factors of the *location* and *function* of each of the permitted signs in Ladue's ordinance. These factors are important because signs that must directly relate to identification of a specific "on-site" occupant or activity cannot proliferate to other locations. *See Heffron v. Inter-*

<sup>6</sup> This Court traditionally accepts a city's construction of its ordinances. *Frisby v. Schultz*, 487 U.S. 474, 482 (1988). The Court also narrowly interprets state laws to "avoid[] constitutional difficulties." *Id.* These rules are particularly applicable to Ladue's ordinance which states: "[T]he City of Ladue opposes discrimination based upon the content of any lawful speech or expression and that the provisions of this chapter are not intended and shall not be interpreted so as to permit any such determination." J.A. 119, New Chapter 35, Declaration of Findings, Policies, Interests, and Purposes.

*national Society For Krishna Consciousness*, 452 U.S. 640, 654 (1981) (upholding rule of state fair committee that limited distribution, sales and solicitation activities to fixed locations).

The Eighth Circuit failed to appreciate the distinction between on-site signs that do not proliferate and off-site signs that do proliferate. *See* J.A. 116-119, New Chapter 35, Declaration of Findings, Policies, Interests, and Purposes (recognizing location and function of signs as justifications for Ladue's ordinance). Moreover, if the small number of commercial establishments, schools, and churches in Ladue were not able to have signs that allowed them to identify their location and activity on the site, their ability to function would be handicapped severely because of the public's reliance on such signs as a primary source of information about the site. Ladue may be required to allow these signs under this Court's "time, place, or manner" test because there may be no adequate and ample alternative modes of expression for the owners or occupants of space in these small areas of the City.

The Eighth Circuit did not address the constitutional problem created by its holding that Ladue's ordinance discriminated against noncommercial speech. If political or other noncommercial signs, for example, must be allowed in areas zoned for commercial and industrial use, those few property owners or occupants could dominate the political or social debate in Ladue to the unfair disadvantage of all owners or occupants of residential property who were not permitted to erect such signs. As the Court observed in *Vincent*:

[N]or is it clear that some of the suggested exceptions [to a prohibition of political signs] would even be constitutionally permissible. For example, even though political speech is entitled to the fullest possible measure of constitutional protection, there are a host of other communications that command the same respect. An assertion that "Jesus Saves," that



"Abortion is Murder," that every women has the "Right to Choose," or that "Alcohol Kills," may have a claim to a constitutional exemption from the ordinance that is just as strong as "Roland Vincent—City Council." [citation omitted]. To create an exemption for appellees' political speech and not these other types of speech might create a risk of engaging in constitutionally forbidden content discrimination. [citation omitted]. Moreover, the volume of permissible postings under such a mandated exemption might so limit the ordinance's effect as to defeat its aim of combatting visual blight.

466 U.S. at 816. *See also Metromedia*, 453 U.S. at 568 n.9 (Burger, C.J., dissenting) ("If a city were to permit on-site noncommercial billboards, one can imagine a challenge based on the argument that this favors the views of persons who can afford to own property in commercial districts.").

Furthermore, there are content-neutral reasons for the exceptions in Ladue's ordinance for on-site or safety related noncommercial signs such as subdivisions and residence identification signs, road and driveway signs for danger, direction, or identification, safety hazard signs, and signs for public transportation stops. *See* J.A. 116-119. The Court of Appeals had no valid basis for its unexplained conclusion that Ladue's allowance of these types of signs indicates that the ordinance "favors certain types of noncommercial speech over others." Pet. App. 4a. The District Court also had no principled basis for its holding that by permitting these noncommercial signs, Ladue was controlling the political and social debate within the City. Pet. App. 28a.

**2. This Court Should Expressly Reject The Metromedia Plurality's "Implied Discrimination" Theory Because It Prevents Local, State, And Federal Governmental Authorities From Enacting Laws Designed To Prevent Visual Blight And Other Evils Caused By A Proliferation Of Signs.**

The Eighth Circuit's opinion brings into sharp focus the theoretical and practical problems that have plagued the *Metromedia* plurality's "implied discrimination" theory for over a decade. Former Chief Justice Burger expressed the dilemma as creating a "series of Hobson's choices" for all cities that desire to regulate the placement of signs and billboards. *Metromedia*, 453 U.S. at 569. The Chief Justice observed that "American cities \* \* \* must, as a matter of federal constitutional law, elect between two unsatisfactory options: (a) allowing all "non-commercial" signs, no matter how many, how dangerous, or how damaging to the environment; or (b) forbidding signs altogether." *Id.* at 556 (Burger, C.J., dissenting) (emphasis in original).<sup>7</sup> *See also id.* at 540, 555 (Stevens, J., dissenting in part) (agreeing with the opinion of Burger, C.J.); *id.* at 569 (Rehnquist, J., dissenting) (agreeing substantially with the opinion of Burger, C.J.).

This Court should reject the *Metromedia* plurality's implied discrimination theory that has never gained the support of the majority of the Justices on this Court. *See Scadron v. City of Des Plaines*, 734 F. Supp. 1437 (N.D. Ill. 1990), *aff'd*, 989 F.2d 502 (7th Cir. 1993) (analyzing each of the opinions in *Metromedia* and concluding that the plurality's implied discrimination theory has no

<sup>7</sup> Leading academic commentators agree with Chief Justice Burger's conclusion. *See, e.g.,* Daniel R. Mandelker & William R. Ewald, *Street Graphics and the Law* 190 (revised ed. 1988) (criticizing the *Metromedia* plurality's opinion "because it places municipalities in an impossible situation"). *See also* Daniel R. Mandelker, Jules B. Gerard & E. Thomas Sullivan, *Federal Land Use Law* § 7.02 at 7-12 (1993) (*Metromedia* "seems to have been undercut, if not implicitly overruled, by *Vincent*").



value as precedent because it was rejected by a majority of the Court).

More than ten years ago, Justice (now Chief Justice) Rehnquist predicted that the *Metromedia* opinion would be viewed by "city planning commissions and zoning boards [who] must regularly confront constitutional claims of this sort \* \* \* [to] be a virtual Tower of Babel, from which no definitive principles can be clearly drawn." 453 U.S. at 569 (Rehnquist, J., dissenting).

Experience has proved that Chief Justice Rehnquist's prediction has come true. While this Court has announced significant changes in the test for "time, place, or manner" regulations of speech, see, e.g., *Ward*, 109 S. Ct. at 2754-2760, the lower courts continue to apply rigidly the outdated plurality opinion in *Metromedia*.<sup>8</sup>

The severe hardship to cities that has been created because of the doctrinal confusion among the lower courts is exemplified by a recent Fourth Circuit case, *Arlington County Republican Committee v. Arlington County, Virginia*, 983 F.2d 587 (4th Cir. 1993). There, a divided panel held that a county's limit of two signs on residential, private property infringed speech by preventing multiple signs for multiple candidates. 983 F.2d at 594. See also Pet. for Cert. 21-22 (collecting cases reflecting conflict and confusion in the Courts of Appeals). Unless the trend in the lower courts is reversed, the residents of Arlington County, Virginia, Ladue, Missouri, and many

<sup>8</sup> *R.A.V.* signalled this Court's disagreement with the reasoning of the lower courts that Ladue discriminated against noncommercial speech because of the exceptions in its ordinance. *R.A.V.* held that exceptions are permitted as long as the "selectivity of the restriction is [not] even arguably 'conditioned upon the sovereign's agreement with what a speaker may intend to say.'" 112 S. Ct. at 2547 (quoting *Metromedia*, 453 U.S. 490, 55 (Stevens, J., dissenting in part) (citation omitted)). Justice Stevens' dissent in *Metromedia*, which would support the constitutionality of Ladue's sign ordinance, has now overtaken *Metromedia*'s plurality opinion. The lower court opinions have lost their intellectual foundation and, therefore, should be reversed.

other cities throughout the United States will be compelled, as a matter of federal constitutional law, to live with visual blight created by the proliferation of signs in their communities.

3. *The Lower Courts' Opinions, Which Are Premised On The Erroneous Principle That Non-commercial Speech Deserves Greater Constitutional Protection In This Case Than Commercial Speech, Conflict With The Reasoning Of City of Cincinnati v. Discovery Network, Inc., — U.S. —, 113 S. Ct. 1505 (1993).*

An assumption of the plurality opinion in *Metromedia*, on which the Eighth Circuit and the District Court principally rely, is that "noncommercial speech is accorded greater protection under the First Amendment than is commercial speech." *Metromedia*, 453 U.S. at 513; Pet. App. 26a (District Court opinion), Pet. App. 4a & cases cited therein (Eighth Circuit opinion).

The Eighth Circuit's and the District Court's opinions conflict with *Discovery Network*, 113 S. Ct. at 1515. There, the Court held that a Cincinnati ordinance prohibiting newsracks containing commercial newspapers was unconstitutional because it "attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech." 113 S. Ct. at 1511.

In contrast to Cincinnati's newsrack ordinance, Ladue's sign ordinance is not based on an erroneous constitutional distinction between noncommercial and commercial speech. Ladue prohibits all noncommercial and commercial signs that proliferate and cause visual blight, or that cause safety hazards. To the extent that signs do not proliferate, or affect public safety, they are permitted.

The *Discovery Network* Court concluded that Cincinnati's ordinance, which was premised on the distinction between commercial and noncommercial speech, "bears

no relationship *whatsoever* to the particular interests [of aesthetics and safety] that the city has asserted." 113 S. Ct. at 1514 (emphasis in original). On the other hand, the guiding principle of Ladue's sign ordinance—whether the signs are likely to proliferate or affect safety—directly relates to the City's interest in preventing visual blight and the deterioration of real estate value while also protecting the safety of the residents.

**F. Even If One Assumes That Ladue's Sign Ordinance Regulates The Content Of Speech, The Ordinance Is Constitutional Because Its Purpose Is To Prevent The "Secondary Effects" Of Signs—Visual Blight, Safety Problems, And Impairment Of Real Estate Values.**

In *R.A.V.*, the Court articulated the secondary effects doctrine as follows: "Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular "secondary effects" of the speech, so that the regulation is 'justified without reference to the content of the . . . speech.'" 112 S. Ct. at 2546 (emphasis in original) (citations omitted).

The Court in *Renton* upheld a zoning ordinance that prohibited an adult movie theater from operating in a residential community. 475 U.S. at 49. It was clear that "the ordinance treats theaters that specialize in [non-obscene] adult films differently from other kinds of theaters." 475 U.S. at 47. Nevertheless, the Court upheld the ordinance because it was justified by the content-neutral "secondary effects" of speech—prevention of crime, preservation of real estate values, and protection of the quality of urban life for families with children—and not the content of speech. *Id.* See also *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2468, 2469 (1991) (Souter, J., concurring) (upholding Indiana's statute that prohibited totally nude dancing as adult entertainment because the ordinance was justified by the content-neutral secondary

effects of speech—the prevention of prostitution, sexual assault, and other criminal activity).

The Eighth Circuit misapplied the secondary effects doctrine, concluding that the doctrine was "inapposite" and that Ladue's sign ordinance was unconstitutional. Pet. App. at 5a-6a. The court's holding is flatly contradicted by the unambiguous language of the sign ordinance and the uncontroverted evidence in the summary judgment record that sign proliferation causes visual blight and other problems. Ladue's ordinance is justified because the City has the right to prevent the content-neutral secondary effects of the proliferation of signs—visual blight, safety problems, and the deterioration of real estate values.

**G. Ladue's Sign Ordinance Is "Narrowly Tailored" Because It Directly And Effectively Prevents Visual Blight Within The City.**

In *Ward*, this Court held that "the requirement of narrow tailoring is satisfied "so long as the \* \* \* regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" 491 U.S. at 799 (citation omitted). The Court held further that a "regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800. Courts must give deference to the reasonable judgment of local legislators who enact laws to protect the residents of cities throughout the country. *Id.* at 801.

Federalism concerns underlie the Court's rejection of a test that would compel a city to prove that its regulation was the least restrictive alternative available. As the Court observed in *Ward*, "The Court of Appeals erred in failing to defer to the city's reasonable determination that its interest in controlling volume would be best served by requiring Bandshell performers to utilize the city's sound technician." 491 U.S. at 800. See also *Discovery*



*Network*, 113 S. Ct. at 1525 (Rehnquist, C.J., dissenting) (“[L]ittle can be gained in the area of constitutional law, and much lost in the process of democratic decision making, by allowing individual judges in city after city to second-guess . . . legislative . . . determinations’ on such matters as esthetics.”) (quoting *Metromedia*, 453 U.S. at 570 (Rehnquist, J., dissenting)).

Ladue’s sign ordinance satisfies the “narrow tailoring” test in *Ward*. By limiting the number of signs permitted in Ladue, the ordinance directly addresses the source of the “evil” created by a proliferation of signs—visual blight, safety problems, and deterioration of real estate values. *Ward*, 491 U.S. at 800; *Frisby v. Schultz*, 487 U.S. 474, 485 (1988); *Vincent*, 466 U.S. at 808. Without the ordinance, Ladue’s important governmental interests would be substantially impaired and would “be achieved less effectively.” *Ward*, 491 U.S. at 799.

The problem that Ladue faces is not confined to respondent’s yard and window signs. If Ladue permitted those signs, it would be compelled to allow all signs containing noncommercial speech. The central problem confronting Ladue is the proliferation of signs that would ensue in the absence of New Chapter 35. See J.A. 154-158, Drummond Aff. ¶¶ 78-97 (discussing evidence of sign proliferation in municipalities in St. Louis County and explaining the manner in which Ladue’s sign ordinance prevents the deleterious effects of this proliferation). As the Court concluded in *Ward*, “[T]he validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government’s interests in an individual case.” 491 U.S. at 801. See also *Hodgkiss*, 565 A.2d at 1064 (opinion of Souter, J.).

While signs are generally prohibited in New Chapter 35, a limited number of signs are permitted. J.A. 121-122, New Chapter 35, § 35-2, § 35-4. The Declaration of Findings, Policies, Interests, and Purposes in Ladue’s sign ordinance explains the reasons underlying the City’s

careful and narrow tailoring to achieve its objectives without unnecessarily restricting speech through the medium of signs. J.A. 116-119. The ordinance reflects Ladue’s sensitivity to *Ward*’s admonition that “Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.” 491 U.S. at 799.<sup>9</sup> See also *id.* at 800 n.7 (“The guideline does not ban all concerns, or even all rock concerts, but instead focuses on the source of the evils the city seeks to eliminate—excessive and inadequate sound amplification—and eliminates them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils. This is the essence of narrow tailoring.”).

Furthermore, Ladue’s sign ordinance satisfies each of the constitutional criteria for “narrow tailoring” discussed by the Court in *Discovery Network*.<sup>10</sup>

<sup>9</sup> Respondent has an exceedingly high burden to meet in arguing that Ladue’s sign ordinance is overbroad. As the Court observed in *Vincent*, “The concept of ‘substantial overbreadth’ is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. \* \* \* In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.” 466 U.S. at 800-801. See also *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (referring to the doctrine’s “strong medicine”).

<sup>10</sup> The Court in *Discovery Network* reviewed Cincinnati’s ban of commercial newsracks under the test in *Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York*, 447 U.S. 557, 563 (1980). This Court has used the *Central Hudson* test to evaluate governmental regulations of commercial speech. In *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 477 (1989), the Court observed that the test for reviewing regulations of commercial speech is “substantially similar” to the Court’s “time, place, or manner” test for reviewing regulations of non-commercial speech. See *Discovery Network, Inc.*, 113 S. Ct. at 1525 (Rehnquist, C.J., dissenting) (opining that “time, place, or manner” test is duplicative of *Central Hudson* test). See also *id.* at 1510 n.11 (reserving question of whether regulations of commercial speech,



First, unlike Cincinnati's old ordinance that was enacted before newsracks created an aesthetic problem, Ladue's New Chapter 35 was enacted to address current visual blight and safety problems caused by the proliferation of signs. 113 S. Ct. at 1510.

Second, the Court characterized the Cincinnati ordinance as having a "paltry" or "minute" effect on reducing the total number of newsracks and, as a result, the ordinance did not address the problem of visual blight. In contrast, Ladue's sign ordinance prevents the problem of visual blight by prohibiting the vast majority of signs in the City. *Id.*

Third, whereas Cincinnati could have remedied its aesthetic problem by regulating the "size, shape, appearance, or number" of newsracks, these alternatives would not resolve the problem that Ladue faces as a result of an inevitable proliferation of signs that would occur absent its ordinance. *Id.* Ladue already regulates the size and number of the few signs that are permitted so that the aesthetics of the community will be maintained. These regulations, however, are not adequate to address the problem caused by the erection of multiple signs throughout Ladue.

As the Court observed in *Vincent*, "the substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself." *Vincent*, 466 U.S. at 810. Thus, "[b]y banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy." 466 U.S. at 808.

The definition of "sign" is another instance of the City's careful balancing in the ordinance. Ladue prohibits only those modes of speech that it has reasonably concluded create a risk of proliferation and visual blight.

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which are not "aimed at either the content of the speech or the particular adverse effects stemming from that content," are entitled to "more exacting" review).

In her Reply Brief filed in the District Court on the cross-motions for summary judgment, respondent argued for the first time that Ladue's sign ordinance was overbroad because, according to her construction of the ordinance, the definition of sign includes a flag. Reply Br. at 8-9. Contrary to respondent's erroneous construction of New Chapter 35, the definition of "sign" expressly includes "banners" and "pennants," but not "flags." J.A. 119-121, New Chapter 35, § 35-1.

This Court should not reach respondent's overbreadth claim because it was not pleaded properly and was not decided in the courts below. J.A. 22-25, 185-189, 113-115, Gilleo's Complaint, Second Amended Complaint, and Motion for Summary Judgment; 2A Jo D. Lucas, et al. *Moore's Federal Practice* 8-76 (1992-93 Supp.) ("The liberal practice under Rule 8(a)(2) does not permit a plaintiff to change the theory of the case at a late stage of the litigation.") (citing *Evans v. McDonald's Corp.*, 936 F.2d 1087 (10th Cir. 1991) (claim raised in opposition to summary motion was not properly before the District Court)). Even if the Court addresses the claim, however, it has no merit and should be rejected.

A "flag" is defined by the fabric material used in its construction and is typically square or rectangular shaped, although it is occasionally made in a different shape such as a swallowtail. *Webster's Third New International Dictionary* 862 (1963) (defining "flag" as "a usu[ally] rectangular piece of fabric"); *Webster's New World Dictionary* 529 (2nd College ed. 1979). Ladue defines "banner" based on its unique elongated rectangular shape; Ladue also defines "pennant" based upon its special shape—a rectangle tapered to a single point. *Webster's Third New International Dictionary* 173 (1963) (characterizing shape of banner by providing literary example of "welcoming banners stretched across the street"); *id.* at 1671 (defining shape of pennant as "tapering usu[ally] to a point"); *Webster's New World Dictionary* 111, 1051 (2nd College ed. 1979).

Contrary to Gilileo's argument, Ladue has not created a content-based definition of "flag," "banner," or "pennant." Banners and pennants fall under the general prohibition of signs regardless of their commercial or non-commercial message. All flags, however, may be flown or displayed in Ladue regardless of their message as long as they are made of fabric and are not in the shape of a banner or pennant. Thus, for example, an American flag or a flag containing the messages contained on respondent's signs are not prohibited under Ladue's ordinance.

This Court traditionally narrowly construes state law to avoid constitutional problems and defers to a city's construction of its ordinance. See *Frisby v. Schultz*, 487 U.S. at 483 (accepting dictionary definition and city counsel's representation of the meaning of a municipal ordinance); *Ward*, 491 U.S. at 794 ("perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity"). Applying these principles to New Chapter 35, Ladue's sign ordinance is content-neutral and narrowly tailored.

#### H. Numerous Alternative And Ample Modes Of Speech Are Available For People to Express Themselves.

The summary judgment record is uncontested that there are numerous alternative and ample modes of speech available for people to express themselves other than through signs.<sup>11</sup> J.A. 158-159, Drummond Aff. ¶ 98 (re-

<sup>11</sup> This Court need not address this element of the *Ward* test because respondent did not contest the issue in the District Court or in the Court of Appeals prior to oral argument. Respondent, therefore, has waived any contention that no alternative modes of expression are available as the issue was not properly before the Eighth Circuit and is not before this Court. See *Jenkins v. Anderson*, 447 U.S. 231 234 n.1 (1980) (Court's refusal to consider issue raised by respondent that had not been preserved in courts below); *Federal Trade Commission v. Grolier, Inc.*, 462 U.S. 19 n.6 (1986) (same); *Jenkins v. Missouri*, 362 F.2d 762, 766 (8th Cir.), cert. denied, 113 S. Ct. 322 (1992) (Court of Appeals will not consider issue that was not raised in the District Court); *Westcott v. City*

viewing numerous alternatives), J.A. 182-183, Spink Aff. ¶ 104 (same). These modes of speech include letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings. *Id.* Respondent also may hold a sign while standing or sitting on her lawn as Ladue's sign ordinance only prohibits signs that are attached to the ground or to a structure on the ground. J.A. 119-121, New Chapter 35, § 35-1.

In *Vincent*, this Court held that political signs were not a unique medium of speech and that many alternatives existed for the expression of one's message:

The Los Angeles ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited. To the extent that the posting of signs on public property has advantages over these forms of expression, [citation omitted], there is no reason to believe that these same advantages cannot be obtained through other means. To the contrary, the findings of the District Court indicate that there are ample alternative modes of communication in Los Angeles. Notwithstanding appellees' general assertions in their brief concerning the utility of political posters, nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication, or that appellees' ability to communicate effectively is threatened by ever-increasing restrictions on expression.

466 U.S. at 812. See also *Hodgkiss*, 565 A.2d at 1067 (opinion of Souter, J.) ("It is thus beyond doubt that the defendant and his associates had the unrestricted opportunity to solicit the attention of the same pedestrians to whom the sign was addressed, and there is no suggestion that restrictions imposed by the city or by any other

of Omaha, 901 F.2d 1486, 1490 (8th Cir. 1990) (Court of Appeals refused to consider issue raised in oral argument but not in the briefs).



unit of government had the effect of limiting the access of would-be sign posters to any other conventional medium of communication.”).

Weighing the competing governmental and individual interests at stake in this case, government's right to legislate for the general welfare should prevail. Individuals have numerous avenues of expression other than through signs. If, however, Ladue and other cities, States, and federal authorities cannot prevent the proliferation of signs, people throughout our country—in our residential neighborhoods, public places, parks, scenic areas, streets and highways—will be compelled to live with visual and urban blight.

## II. LADUE HAS THE RIGHT TO REGULATE PRIVATE PROPERTY TO PREVENT THE NUISANCE OF VISUAL BLIGHT.

This Court has held that government may restrict the “time, place, or manner” of speech on private as well as public property. *Barnes*, 111 S. Ct. at 2460; *Renton*, 475 U.S. at 44, 46-48. Ladue, therefore, has the right to regulate respondent's use of her real property by prohibiting signs that can proliferate and cause visual blight. The Court should reject respondent's absolutist view of the First Amendment and her implicit challenge of traditional governmental land-use and zoning powers to abate nuisances such as visual blight if there is an incidental effect on speech.

Ladue's regulatory authority is rooted in the police powers which have been delegated traditionally to government and which allow zoning laws that are so important in urban planning. *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (State may exercise its police powers to protect the aesthetic qualities of its cities); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding the constitutionality of city's zoning laws regulating the use of private property).

Ladue's sign ordinance, designed to prevent visual blight that harms its natural landscapes and aesthetic ambience, stands on the same authority as state laws prohibiting individuals from creating nuisances on their private property. As the Court observed in *Euclid*, 272 U.S. at 388, “A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.” The private, “residential character” of Willow Hill and indeed 97% of Ladue should “inform the application of the relevant test” for “time, place, or manner” regulations of speech. *Frisby*, 487 U.S. at 481.

In reviewing Ladue's sign ordinance, the Court should be sensitive to Ladue's right to protect the privacy interests of its residents and the natural charm of its beautiful residential areas. As Justice Stevens observed for the Court in *Vincent*, a city's interests in preventing visual blight caused by the proliferation of signs are both “psychological and economic” and are “presumptively at work in all parts of the city.” 466 U.S. at 817.<sup>12</sup>

The Court in *Frisby*, 487 U.S. at 194, underscored the importance of residential privacy in the calculus of values that must be weighed in a “time, place, or manner” regulation of speech. Quoting from *Carey v. Brown*, 117 U.S. 455, 471 (1980), the *Frisby* Court observed: “The State's interest in protecting the well-being, tranquility,

<sup>12</sup> In his dissenting opinion in *Metromedia*, Justice Stevens emphasized the right of a city to prevent the visual blight caused by a proliferation of signs in residential as well as commercial parts of the city. “It seems to be accepted by all that a zoning regulation excluding billboards from residential neighborhoods is justified by the interest in maintaining pleasant surroundings and enhancing property values. \* \* \* The character of the environment affects property values and the quality of life not only for the suburban resident but equally so for the individual who toils in a factory or invests his capital in industrial properties.” 453 U.S. at 552 (Stevens, J., dissenting in part).



and privacy of the home is certainly of the highest order in a free and civilized society. \* \* \* [P]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value." 487 U.S. at 484.

This Court should affirm Ladue's right to protect the privacy right of all of Ladue's residents to enjoy the beauty of their neighborhoods. See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion) ("[T]he city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect.").

### III. LADUE'S RIGHT TO REGULATE IS STRENGTHENED BECAUSE THE RESIDENTS OF LADUE ARE HELD "CAPTIVE" TO THE VISUAL BLIGHT CREATED BY THE PROLIFERATION OF SIGNS.

This Court has recognized the right of government to protect "captive audiences" from being subjected to unwanted speech that intrudes on their sense of privacy and well-being. The Court also should acknowledge Ladue's right to protect its "captive" residents from the ugly intrusion of visual blight created by a proliferation of signs.

In *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932), the Court upheld a statute that did not permit the advertising of cigarettes on billboards and street car placards. Writing for the Court, Justice Brandeis approved of the following observation of the state court that had initially upheld the statute: "Billboards, street car signs, and placards and such are in a class by themselves. \* \* \* Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. \* \* \* In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard." 285 U.S. at 110. The Court in *Lehman v. City of Shaker Heights*, 118

U.S. 298 (1974), upheld a city's right to prohibit political advertising and permit commercial advertising on its buses. Writing for the plurality, Justice Blackmun approved of Justice Brandeis' opinion in *Packer Corp.* and concluded that a city had the right to protect its "captive audience" from advertising that offended the city's goal of providing "convenient" and "pleasant" service to its customers. *Lehman*, 418 U.S. at 301-303; see also 418 U.S. at 306-308 (Douglas, J., concurring) (agreeing with "captive audience" theory).

In *Vincent*, when the Court upheld Los Angeles' ban on signs in public places, it relied on *Lehman* and its emphasis on protecting "unwilling viewers against intrusive advertising." 466 U.S. at 806; see also *R.A.V.*, 112 S. Ct. at 2568 (Stevens, J., dissenting) (quoting *Lehman* and emphasizing that "[t]he protection afforded expression turns as well on the context of the regulated speech"). In *United States v. Kokinda*, — U.S. —, 110 S. Ct. 3115, 3119 (1990), the Court again reaffirmed *Lehman* when it upheld a Postal Service regulation that prohibited solicitation on sidewalks near Post Offices.

*Frisby* reinforced the Court's protection of "captive" homeowners who have a right to be free from picketing that disturbs the "sanctity of the home." 487 U.S. at 484. The Court held that "[t]here is simply no right to force speech into the home of an unwilling listener." 487 U.S. at 485.

The ugliness that will be created by the proliferation of yard signs in Ladue's small, private residential streets would be apparent when one tries to enjoy a pleasant walk in one's neighborhood. The visual blight will also infiltrate one's home when one tries to relax and enjoy the scenic view of the trees, plants, and flowers in the yards near one's home. Ladue should be permitted to protect its captive residents from the ill effects of the sign pollution that threatens the beauty and natural settings in Ladue.

**IV. LADUE'S EXTENSIVE SUMMARY JUDGMENT RECORD DEMONSTRATES THAT ITS SIGN ORDINANCE WOULD PASS JUSTICE BRENNAN'S AND JUSTICE BLACKMUN'S STRICT CONSTITUTIONAL TEST BECAUSE LADUE HAS MADE A "COMPREHENSIVE COMMITMENT" TO THE BEAUTIFICATION OF ITS UNIQUE CITY.**

Justices Brennan and Blackmun criticized the *Metro-media* plurality's "implied discrimination" theory. They concurred in the Court's judgment but expressly rejected the "all or nothing" approach that characterizes the implied discrimination theory. Indeed, Justice Brennan went so far as to state that the plurality's view made "little sense." 453 U.S. at 532 n.10 (Brennan, J., concurring, joined by Blackmun, J.).

Justices Brennan and Blackmun would permit a prohibition of signs with narrowly tailored, content-based exceptions. 453 U.S. at 532, 532 n.10, 533. Before upholding such a prohibition, however, Justices Brennan and Blackmun would require the municipality to make a record that it is "seriously and comprehensively addressing aesthetic concerns \* \* \*. *Id.* at 531. By showing a comprehensive commitment to making its physical environment in commercial and industrial areas more attractive, and by allowing only narrowly tailored exceptions, if any, San Diego could demonstrate that its interest in creating an aesthetically pleasing environment is genuine and substantial." 453 U.S. at 531, 532, 533. These Justices would require cities to establish a record of preserving aesthetics in areas that extended beyond sign control. *Id.*

Justices Brennan and Blackmun concluded that they had "little doubt" that some cities—such as the historic community of Williamsburg, Virginia<sup>13</sup>—could prove the

<sup>13</sup> The internationally famous landscape architect, Arthur A. Shureliff, joined Ladue's planner, Harland Bartholomew, and other experts to restore the natural beauty and history of Williamsburg. See George H. Yetter, *Williamsburg Before and After* 67 (1993) (describing highlights of Shureliff's work). See also J.A. 144,

substantiality of their interest in aesthetics. 453 U.S. at 534. The City of Ladue is precisely the type of unique community—dedicated to furthering the goals of aesthetics and safety throughout its city—that can meet these strict constitutional standards under which a prohibition on signs with narrowly tailored exceptions would be permitted. The affidavits of Malcolm C. Drummond and Mayor Edith J. Spink, and the exhaustive set of exhibits in support of each affidavit, provide this Court with an extensive record of Ladue's extraordinary commitment to the aesthetics and preservation of its city through its sign ordinances, zoning laws, and award-winning beautification projects. See J.A. 138-159, Drummond Aff., J.A. 161-183, Spink Aff.

**V. EVEN IF LADUE'S SIGN ORDINANCE IS DEEMED TO REGULATE THE CONTENT OF SPEECH, THE ORDINANCE SATISFIES THE COMPELLING STATE INTEREST TEST BECAUSE IT PERMITS AS MUCH SPEECH AS POSSIBLE WHILE ALSO PROTECTING LADUE'S RESIDENTS FROM THE EVILS OF SIGN PROLIFERATION.**

Even if this Court concluded that Ladue's sign ordinance has "content-based" restrictions on speech and that the City could not satisfy the "secondary effects" test, the constitutionality of Ladue's ordinance should be upheld because the restrictions are "reasonably necessary to achieve \* \* \* [Ladue's] compelling interests." R.A.V., 112 S. Ct. at 2550.<sup>14</sup>

Ladue's compelling state interests include the exercise of its police powers to achieve the purposes identified in its sign ordinance, its rights under the Tenth Amend-

Drummond Aff. ¶ 29 Ex. E (discussing Bartholomew's work on the Williamsburg restoration project).

<sup>14</sup> Presumably, the compelling state interest test is easier to meet than Justice Brennan's and Blackmun's strict standard because it would not require a city to make a record of a special and extraordinary commitment to beautification efforts. See *Metromedia*, 453 U.S. at 532 (Brennan, J., concurring, joined by Blackmun, J.).



ment, as well as Ladue's rights under the "liberty" and "property" clauses of the Fourteenth Amendment, to protect the quality of life of its residents by prohibiting signs that proliferate and diminish the value of real estate within the City. Ladue also has a compelling interest under the First Amendment in permitting as much speech as possible through the narrow exceptions in its ordinance that permit a limited number of signs. Ladue's compelling interests in aesthetics, privacy, safety, and the protection of real estate values justify the manner in which Ladue has regulated signs in New Chapter 35.

The Eighth Circuit stated without any explanation of evidentiary support from the record that "[w]e have no trouble concluding that Ladue's ordinance is not the least restrictive alternative." Pet. App. 7a. Respondent has not suggested a single alternative that is constitutional and that Ladue is not using already to prevent the proliferation of signs and the resulting visual blight.

#### **VI. THE LOWER COURTS' OPINIONS JEOPARDIZE THE CONSTITUTIONALITY OF THE HIGHWAY BEAUTIFICATION ACT OF 1965.**

The lower courts' "all or nothing," "implied discrimination" theory raises questions about the constitutionality of the federal Highway Beautification Act Of 1965 (hereinafter "Act"), 23 U.S.C.A. § 131 *et seq.* (West Supp. 1990). See *Metromedia*, 453 U.S. at 515 n.20 (reserving question concerning the constitutionality of the Act).

The purpose of the Act is to regulate signs and billboards adjacent to the interstate highway system "to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C.A. § 131(a). The Act contains a list of exceptions to its general ban of signs within the regulated area. These exceptions permit signs that include:

1. "directional and official signs;"
2. signs "advertising sale or lease of the property upon which they are located;"

3. signs "advertising activities conducted on the property on which they are located;"
4. "landmark signs \* \* \* of historic or artistic significance;" and
5. signs "advertising distribution by nonprofit organizations of free coffee to individuals traveling" on the highways.

23 U.S.C.A. § 131(c) (West Supp. 1990).

Based upon the lower courts' theory, one could argue that the limited number of signs that are permitted under the Act reflects Congress' implied intent to discriminate against political and other forms of noncommercial speech that are prohibited under the federal legislation. On the other hand, like Ladue's sign ordinance, the Act would pass the "time, place, or manner" test under *Ward*, *R.A.V.*, and *Vincent*. The exceptions in the statute reflect the content-neutral purposes or justifications for the Act—preservation of the natural scenic beauty of the landscape, safety, and protection of the "public investment" in the highway system. Moreover, like Ladue's ordinance, the exceptions would allow as much speech as possible while also preventing the proliferation of signs and the resulting visual blight.

The question of the constitutionality of the Act is not before the Court. Nevertheless, a comparison of the competing interests at stake in Ladue's sign ordinance with the interests affected by the federal Act demonstrates that Ladue's ordinance has a stronger claim of constitutional validity.

Ladue's regulation involves a very small geographical area (8.5 square miles) in which there has been placed a high value on aesthetics and residential privacy. Aesthetics and the prevention of visual blight are interests that unquestionably deserve to be protected on our nation's highways through sign regulations such as the Highway Beautification Act. Nevertheless, it would be difficult to argue that all parts of our nation's highway system,



spanning thousands of miles, have a unique aesthetic ambience or quality of privacy that deserve greater or even the same protection as the beautifully landscaped and carefully preserved small residential neighborhoods in Ladue.

This Court should not interpret the First Amendment to give signs and billboards a unique and privileged status in the law. In today's world of advanced communications, there are many modes of expression that are available for all people to use. If Ladue and other cities cannot enact reasonable sign regulations, people will lose their right to be free of visual blight that diminishes the quality of their lives.

#### CONCLUSION

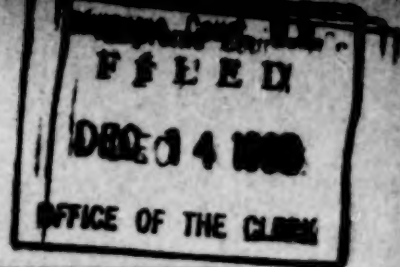
For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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November 15, 1993

(12)  
No. 92-1856



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

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CITY OF LADUE, et al.,  
*Petitioners,*

vs.

MARGARET P. GILLEO,  
*Respondent.*

---

On Writ of Certiorari to the  
United States Court of Appeals for the Eighth Circuit

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**BRIEF FOR RESPONDENT**

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## **QUESTION PRESENTED**

Whether a municipal ordinance barring a citizen from displaying a small sign at her own home, expressing her views on an important public issue, violates the First Amendment, especially where the ordinance allows other signs, both commercial and noncommercial.



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

No. 92-1856

CITY OF LADUE, *et al.*,

*Petitioners,*

v.

MARGARET P. GILLES,

*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Eighth Circuit

**BRIEF FOR RESPONDENT**

**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a) is reported at 986 F.2d 1180 (8th Cir. 1993). The relevant opinions of the district court (Pet. App. 11a, 22a) are reported at 774 F. Supp. 1559 and 1564 (E.D. Mo. 1991). Other orders of the district court are reported at 791 F. Supp. 238 and 240 (E.D. Mo. 1992).

### —STATEMENT

This case concerns a citizen's First Amendment right to display a small unobtrusive sign at her own home, expressing her views on an important public issue, notwithstanding a municipal government's asserted aesthetic interests disfavoring such signs. Despite petitioners' protestations to the contrary, their sign ordinance contains content-based preferences, some of which favor forms of speech entitled to less, not more, First Amendment protection than respondent's sign. Moreover, the ordinance is not a narrowly tailored means of serving petitioners' asserted interests.

1. In December 1990, respondent Margaret P. Gilleo was deeply concerned over the prospect of war with Iraq, which seemed imminent. J.A. 69. A St. Louis area group was distributing yard signs to raise public awareness of the issue and encourage people to contact their elected representatives in Washington. J.A. 40-41, 69. Ms. Gilleo obtained a sign and placed it in the front yard of her home. The sign was 24 by 36 inches, and combined graphics with text reading "Say No to War in the Persian Gulf, Call Congress Now." Pet. App. 22a; J.A. 194.<sup>1</sup> She intended her message to reach people driving through her subdivision, including residents, guests, household employees, delivery persons and tradespeople. J.A. 40-42, 76.

Ms. Gilleo lives in a residential subdivision of the City of Ladue, a suburb of St. Louis, Missouri. Ladue covers an area of approximately 8.5 square miles, and has a population of nearly 9,000. J.A. 148, 162. Shortly after she posted her

<sup>1</sup> A photograph of Ms. Gilleo's yard sign, which was part of the summary judgment record below, appears at J.A. 194, and in the Appendix to this brief at 1a.

sign, the Ladue police informed her that such signs were prohibited in Ladue. J.A. 70-71. Ms. Gilleo went to City Hall to further discuss the matter, and was given a copy of Ladue's sign ordinance. J.A. 71.

The ordinance ("Old Chapter 35") prohibited all signs in Ladue except those expressly authorized within the ordinance. Sec. 35-3, J.A. 27; Sec. 35-6, J.A. 28. Permitted signs included "municipal signs" (Sec. 35-2(a), J.A. 27); "[s]ubdivision identification signs" (Sec. 35-2(b), J.A. 27); "road signs for danger, direction or identification" (*id.*); "[s]igns...on a residence building stating only the name and profession of an occupant" (Sec. 35-2(c), J.A. 27); real estate for sale or for rent signs (Sec. 35-2(e), J.A. 27); signs for churches or schools (Sec. 35-11, J.A. 32); and a variety of commercial signs (Secs. 35-7 through 35-10, J.A. 28-31). Old Chapter 35 also permitted variances:

The council may grant a permit required by this chapter and permit a variation in the strict application of the provisions and requirements of this chapter where there are practical difficulties or unnecessary hardships, or where the public interest will be best served by permitting such variation.

Sec. 35-5, J.A. 28.

Taking note of the variance provision, Ms. Gilleo made another trip to City Hall and subsequently appeared at a meeting of the Ladue City Council to seek a permit for her sign. J.A. 72-74. At the Council meeting, one of the points on which the discussion centered was the "controversial" nature of Ms. Gilleo's sign. Deposition of Thomas R.



Remington, J.A. 46.<sup>2</sup> The City Council voted unanimously to deny Ms. Gilleo a permit. J.A. 72-74.

2. On December 20, 1990, Ms. Gilleo commenced this action against the City of Ladue and various of its officials in the United States District Court for the Eastern District of Missouri under 42 U.S.C. § 1983. She alleged that Ladue's sign ordinance, on its face and as applied, violated her rights to free speech guaranteed by the First and Fourteenth Amendments, and sought declaratory and injunctive relief. J.A. 22-25.

Ms. Gilleo moved for a preliminary injunction, and an evidentiary hearing was held December 26, 1990. J.A. 2. Ladue presented witnesses at the hearing who testified that they objected to Ms. Gilleo's sign because they viewed it as controversial. Edith J. Spink, the Mayor of Ladue since 1975 and a petitioner here, testified that she considered Ms. Gilleo's yard sign to be "controversial," and she felt that controversial signs could lead to arguments or debates in Ladue neighborhoods, which should not be encouraged. J.A. 94, 161.<sup>3</sup> Mark G. Arnold, a lawyer and resident of

<sup>2</sup> Mr. Remington, the President of the Ladue City Council for more than fifteen years, and a petitioner in this case, recalled another councilman stating at the meeting "that he felt that Ladue was the type of community that ensures its residents both the privacy, the freedom from having to observe signs ...." J.A. 43-45. Mr. Remington also recalled the same councilman questioning Ms. Gilleo "on whether she would advocate abortion versus nonabortion, would these be the kinds [sic]." J.A. 46.

<sup>3</sup> Mayor Spink also testified, in a pre-hearing deposition, that she would be more likely to vote for a variance allowing a sign stating "Free the Hostages," "Give up Drugs" or "Narcotics Kill," than a sign stating "Right to Life," "Women's Lib" or "Stop War in the Gulf." J.A. 55-56.

Ms. Gilleo's subdivision, testified that "[w]hat the sign does, when you walk past it or these days, more likely drive past it, it forces the existence of that controversy into the forefront of your mind." J.A. 101.<sup>4</sup>

On January 7, 1991, the district court ruled that Ladue's sign ordinance, on its face, violated the First Amendment, and entered a preliminary injunction against its enforcement. Pet. App. 22a. Relying principally on *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (plurality opinion), the district court concluded that "Ordinance 35 impermissibly places greater value upon commercial than noncommercial speech and impermissibly values the content of certain noncommercial speech over that of other noncommercial speech ...." Pet. App. 31a.

3. On January 21, 1991, fourteen days after the preliminary injunction ruling, Ladue amended its sign law by repealing Old Chapter 35 and adopting a replacement

<sup>4</sup> Mr. Arnold also testified, in response to the question "how, if at all, do you believe that the placement of that sign in Ms. Gilleo's front yard, would affect the peace and quiet of your neighborhood, as you've described it?"

Well, I frankly would prefer that she did not put the sign up and the reason is, that the sign is, by its very nature, a kind of a controversial sign, that calls upon me, it forces itself upon me and says, you know, react, agree, disagree, says it's a better idea to send Sadaam back to the Stone Age, by thermonuclear device or alternatively, that what we're doing there, is all wrong. I would rather not be confronted with that kind of a controversial thought, when I drive into my subdivision at the end of the day.

ordinance ("New Chapter 35"). J.A. 180-81.<sup>5</sup> New Chapter 35 was virtually identical to Old Chapter 35 with respect to its preferential treatment of commercial speech over noncommercial speech, and its valuing of some types of noncommercial speech over others. Like its predecessor, New Chapter 35 prohibited all signs except those authorized in the ordinance. Sec. 35-2, J.A. 121. Exempted from the general ban were ten categories of signs:

- (a) Municipal signs but said signs shall not be greater than nine (9) square feet.
- (b) Subdivision and residence identification signs of permanent character but said subdivision identification signs shall not be greater than six (6) square feet and said residence identification signs shall not be greater than one (1) square foot.
- (c) Road signs and driveway signs for danger, direction, or identification but said signs shall not be greater than twelve (12) square feet.
- (d) Health inspection signs but said signs shall not be greater than two (2) square feet.
- (e) Signs for churches, religious institutions, and schools subject to the restrictions described in Sec. 35-5.<sup>6</sup>

<sup>5</sup> Minor amendments to New Chapter 35, not relevant here, were enacted on February 25, 1991. J.A. 181.

<sup>6</sup> Sec. 35-5 of New Chapter 35 provided that churches, religious institutions and schools could erect, on the premises they occupied, "one (1) identification sign and one (1) wall bulletin or one (1) ground sign, none of which shall be more than sixteen (16) square feet in area ...." J.A. 122. Such signs could contain "announcements relating to the name

- (f) Identification signs for not-for-profit organizations not otherwise described herein but said signs shall not be greater than sixteen (16) square feet.
- (g) Signs identifying the location of public transportation stops but said signs shall not be greater than three (3) square feet.
- (h) Ground signs advertising the sale or rental of real property subject to the restrictions described in Sec. 35-10.<sup>7</sup>
- (i) Commercial signs in commercially zoned or industrial zoned districts subject to the restrictions as to size, location, and time of placement hereinafter described.<sup>8</sup>

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of such church, religious institution, or school, its services, activities or other functions ...." J.A. 123. Such institutions further could "erect a temporary sign during a continuous period of not more than sixty (60) days, subject to the same limitations as to area and announcements." *Id.*

<sup>7</sup> Section 35-10 of New Chapter 35 limited for sale and for lease signs to "a single ground sign advertising the sale or rental of the real property upon which it is maintained"; limited the size of such signs to "not greater than six (6) square feet"; and limited the permissible content to statements "(a) that the property is for sale, lease or exchange by the owner or his agent; (b) the owner's or agent's names; and (c) the owner's or agent's address or telephone number." J.A. 126.

<sup>8</sup> The size, location and numerical limitations for commercial signs in commercially or industrially zoned districts were similar to the requirements for such signs contained in Old Chapter 35. Compare New Chapter 35, Secs. 35-6, 35-7, 35-8 and 35-9, J.A. 123-26, with Old Chapter 35, Secs. 35-7, 35-8, 35-9 and 35-10, J.A. 28-31.



- (j) Signs identifying safety hazards but said signs shall not be greater than twelve (12) square feet.

Sec. 35-4, J.A. 121-22.

The principal change in the new ordinance from the old was that Ladue prefaced New Chapter 35 with a lengthy and self-serving preamble, captioned "Declaration of Findings, Policies, Interests and Purposes." Art. I, J.A. 116. The preamble declared that the sign restrictions contained in New Chapter 35 "are necessary to protect and preserve the City of Ladue's interests in privacy, aesthetics, safety and property values." J.A. 117.<sup>9</sup>

Worthy of note is that New Chapter 35, by its terms, seemed to prohibit the display of flags, including the American flag. Under New Chapter 35, the term "sign," in the context of the ordinance's general ban against signs, was defined to include "[a] name, word, letter, writing, identification, description, or *illustration*...which publicizes an object, product, *place*, activity, *opinion*, person, institution, organization or place of business ...." Sec. 35-1, J.A. 120 (emphasis added). New Chapter 35 further provided that "[t]he word 'sign' shall also include 'banners', 'pennants'...." *Id.* Ladue states, however, that all flags, including "an American flag or a flag containing the messages contained on respondent's signs," may be "displayed in Ladue regardless of their message as long as

<sup>9</sup> New Chapter 35 also circumscribed the City Council's authority to grant variances (Sec. 35-22, J.A. 130), in order to obviate the constitutional difficulties inherent in Old Chapter 35's allowance of unfettered discretion concerning variances. It further included a severability clause (Sec. 35-24, J.A. 130).

they are made of fabric and are not in the shape of a banner or pennant." Pet. Br. 40.<sup>10</sup>

4. On January 28, 1991, Ms. Gilleo filed an amended complaint challenging the constitutionality of New Chapter 35 on essentially the same basis as Old Chapter 35. J.A. 4, 185. On February 7, 1991, Ladue "filed a counterclaim seeking a declaratory judgment that New Chapter 35 is valid and enforceable under the Constitution." Pet. App. 11a-12a. At the time these pleadings were filed, Ms. Gilleo no longer was maintaining her yard sign, but was displaying a small sign inside a second-floor window of her home, visible from the street. J.A. 113-14, 188. The sign was 8½ by 11 inches and stated "For Peace in the Gulf." Pet. App. 3a.<sup>11</sup> The remaining proceedings below pertained to Ms. Gilleo's window sign.

The parties filed cross-motions for summary judgment. J.A. 113, 132. In support of its position, Ladue filed an affidavit of Malcom C. Drummond, a paid outside consultant to Ladue (J.A. 138, 139-40), and two affidavits of Mayor Spink (J.A. 161, 197). Respondent submitted an affidavit of Nancy R. Sachs, a Ladue resident. J.A. 190.<sup>12</sup>

<sup>10</sup> Ladue's interpretation of the ordinance's applicability to flags, and the significance of that interpretation for purposes of this case, are further discussed *infra* at pp. 23-24.

<sup>11</sup> A photograph of Ms. Gilleo's window sign, which was part of the summary judgment record below, appears at J.A. 195, and in the Appendix to this brief at 2a.

<sup>12</sup> Contrary to Ladue's assertions (Pet. Br. 20-21), respondent submitted the Sachs Affidavit for its first-hand factual observations, not as expert opinion. Ms. Sachs testified that she toured various subdivisions in Ladue on five separate occasions between January 30 and February 16, 1991,



On October 1, 1991, the district court entered a Memorandum and Order granting Ms. Gilleo's summary judgment motion, denying Ladue's motion, and permanently enjoining the enforcement of certain portions of New Chapter 35. Pet. App. 11a. The district court found that "New Chapter 35 suffers the same infirmities as Old Chapter 35 in that it prefers some protected speech to other speech based on content." Pet. App. 16a. On that basis, the court concluded that "[t]he general principles of law stated in the order of this Court granting Plaintiff's request for preliminary injunction with respect to Old Chapter 35 apply as well to New Chapter 35." Pet. App. 16a-17a.

5. Ladue appealed and, in a unanimous panel decision rendered February 22, 1993 (amended May 4, 1993), the United States Court of Appeals for the Eighth Circuit affirmed. Pet. App. 1a. The court of appeals, guided by the plurality opinion in *Metromedia, supra*, found New Chapter 35 to be a content-based regulation of speech in that it "favors commercial speech over noncommercial speech, and it favors certain types of noncommercial speech over others." Pet. App. 4a (footnote omitted).

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shortly after "Ladue made the public announcement that it would not enforce the terms of its ordinance until the federal court ruled on the constitutionality of the ordinance." J.A. 190. She reasoned that "this would be the perfect time to see for myself whether the lack of [an] enforceable ordinance—in effect no ordinance—would lead to a proliferation of political, non-commercial signs in Ladue," since this was a "tense period of war in the Middle East and highly-charged debate among the citizens of Ladue over this sign ordinance." J.A. 190-91. Ms. Sachs observed a number of American flags and yellow ribbons on her tours but did not see any other political signs. J.A. 191-92.

The court rejected Ladue's assertion that the "secondary effects doctrine," adopted in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986), required that New Chapter 35 be viewed as content-neutral. Pet. App. 5a. The court stated that "[a]ssuming *arguendo* that the 'secondary effects' doctrine extends to cases involving the prohibition of political signs on private property," Ladue's secondary effects argument fails for want of sufficient support in that "Ladue has not shown that the prohibited signs cause more aesthetic, safety, and property value problems than the permitted signs." Pet. App. 5a (footnote omitted). The court further stated that the lack of correlation between Ladue's asserted interests in eliminating the claimed secondary effects and the categories of signs singled out for discriminatory treatment "undermines Ladue's commitment to its secondary-effects justification and supports the contention that the ordinance is aimed at the content of the signs." Pet. App. 6a.

Because Ladue's ordinance was a content-based restriction, the court of appeals held that it must withstand strict scrutiny to survive, *i.e.*, it "must be necessary to serve a compelling interest and must be narrowly drawn to achieve that end." Pet. App. 6a-7a. While the court viewed Ladue's asserted interests as "substantial," it held that "the interests are not sufficiently 'compelling' to support a content-based restriction." Pet. App. 7a. The court further found that "Ladue's ordinance is not the least restrictive alternative." Pet. App. 7a. This Court granted certiorari on October 4, 1993. J.A. 199.

## SUMMARY OF ARGUMENT

At issue here is a confrontation between one of our most cherished constitutional rights—a citizen's First Amendment right to freely express her views, at her own home, concerning an important public issue—and a municipal government's effort to promote its aesthetic tastes by banning an entire mode of political expression. As this Court said in another context, "[i]t is precisely this kind of choice...that the First Amendment makes for us." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).<sup>13</sup> Both lower courts correctly concluded that Ladue's ordinance must be struck down.

1. Ms. Gilleo's sign constituted virtually pure speech and concerned an issue of war and peace. The sign was placed on her own private residential property, and was positioned to be visible from the street, which is a traditional public forum. Further, Ms. Gilleo's chosen form of speech constitutes an important mode of communication, particularly in the area of political expression. Small signs are a uniquely effective and inexpensive mode of speech, and have been a hallmark of American political expression throughout our history.

Thus, from the standpoint of its subject matter, location and mode, Ms. Gilleo's speech is of a kind entitled to the utmost degree of First Amendment protection. It requires no extended analysis to conclude that the First Amendment constrains Ladue from prohibiting Ms. Gilleo's sign.

<sup>13</sup> Freedom of speech as protected by the First Amendment is among the fundamental guarantees which the Fourteenth Amendment makes applicable to the States. See, e.g., *Burson v. Freeman*, \_\_\_ U.S. \_\_\_, 112 S. Ct. 1846, 1849-50 (1992).

2. Ladue's ordinance is a particularly odious restraint against speech because it is content-based. Ladue has sought to pick and choose among subjects to be addressed by signs, decreeing that some will be allowed while others are prohibited. This Court made clear last term, in *City of Cincinnati v. Discovery Network, Inc.*, \_\_\_ U.S. \_\_\_, 113 S. Ct. 1505 (1993), that this sort of content-based regulatory scheme is antithetical to the First Amendment.

The content-discrimination inherent in Ladue's ordinance is especially egregious because the ordinance allows certain commercial signs but bans noncommercial signs, including those containing political speech, in the same locations. The ordinance thereby inverts the constitutional principle that noncommercial speech enjoys greater First Amendment protection than commercial speech.

Ladue argues that it constitutionally may allow onsite signs while prohibiting offsite signs; however, that is not Ladue's chosen regulatory scheme. Ladue's ordinance permits some onsite signs and some offsite signs, while banning others in both categories. Similarly, *Discovery Network* forecloses Ladue's contention that its ordinance should be deemed content-neutral as being aimed at "secondary effects" of signs. To the extent that there are any "secondary effects" from signs, they arise to the same degree from all signs, both prohibited and permitted. Further, Ladue's secondary effects argument amounts to little more than an effort to ban speech based on anticipated negative reactions of viewers, which is a constitutionally impermissible basis for regulation.

As a content-based restriction against free expression, Ladue's ordinance is subject to, and fails, strict scrutiny. Ladue's asserted aesthetic and other concerns are not sufficient to justify sealing off an entire community against



an important mode of expression. Nor is the ordinance narrowly drawn. Ladue attempts to limit the overall impact of signs not by content-neutral regulations regarding their number, size, point of placement or duration of display, but by banning virtually all signs throughout the city. That is not the least restrictive alternative; it is the most draconian way of addressing Ladue's stated concerns.

3. Even viewing Ladue's ordinance as content-neutral—which it is not—it fails to pass constitutional muster. As a ban against an important mode of expression, Ladue's ordinance must be subjected to a searching level of scrutiny akin to strict scrutiny, which it cannot survive.

Similarly, Ladue's efforts to justify its ordinance as a time, place and manner regulation are unavailing. Aside from the fact that the ordinance is not content-neutral, and bans signs rather than regulating their time, place and manner, Ladue's ordinance is not narrowly tailored. It burdens substantially more speech than necessary to serve Ladue's asserted interests, and there is no reasonable fit between Ladue's desired ends and chosen means. Moreover, the ordinance does not leave open ample alternative channels of communication. All of the alternatives put forth by Ladue are more expensive, more time consuming or less effective than the posting of a small sign and are, therefore, inadequate.

Ladue, in its time, place and manner argument, places heavy reliance on *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); however, that reliance is misplaced. *Vincent* concerned a content-neutral regulation of the time, place and manner of speech in an area which was not a traditional public forum, whereas this case involves a content-based ban against virtually an entire mode of expression on the speaker's own private property adjacent to a public forum. Accordingly,

*Vincent* is readily distinguishable from this case, and does not support, let alone compel, a conclusion that Ladue's sign ordinance is constitutional.

4. Ladue's contention that the decision below jeopardizes the constitutionality of the federal Highway Beautification Act, 23 U.S.C. § 131 (1988 & Supp. IV 1992), is a red herring. There are obvious differences between a government's interest in regulating large billboards, and its interest in regulating a small political sign like respondent's placed inside a window of her home. Moreover, the Act does not ban billboards; it merely restricts their placement in proximity to federal highways in certain zones. Thus, the Act is a time, place and manner regulation. Finally, the Act generally permits onsite signs but proscribes offsite signs, a scheme which can be deemed content-neutral and is markedly different from Ladue's ordinance. This case has little, if anything, to do with the Highway Beautification Act.

## ARGUMENT

### I. This Case Concerns Core Political Speech on the Speaker's Own Residential Property, which Commands the Utmost Degree of First Amendment Protection.

Without doubt, respondent's speech in this case is entitled to the highest level of First Amendment protection. It addressed a political issue of obvious public importance, occurred within Ms. Gilleo's own home, and utilized a traditional and uniquely important mode of expression.

Ms. Gilleo's sign reflected precisely the sort of free discussion of governmental affairs that the First Amendment was designed to promote. "[T]here is practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs."



*Mills v. Alabama*, 384 U.S. 214, 218 (1966). "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, Ladue's efforts to suppress Ms. Gilleo's speech strike at the very heart of the First Amendment.

Moreover, Ms. Gilleo's sign was placed within her own private residential property. Implicated here, then, is Ms. Gilleo's right to do what she wishes in her own home. In *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 811 (1984), the Court commented on the fact that a ban against posting signs on utility pole wires on public property did not also extend to private property, stating "[t]he private citizen's interest in controlling the use of his own property justifies the disparate treatment." Likewise, in *Spence v. Washington*, 418 U.S. 405 (1974), the Court held that a statute prohibiting flag misuse could not constitutionally be applied against a person who hung an American flag, with a peace symbol affixed, upside down from a window of his residence. The Court emphasized that "the activity occurred on private property, rather than in an environment over which the State by necessity must have certain supervisory powers unrelated to expression." 418 U.S. at 411. See also *Stanley v. Georgia*, 394 U.S. 557 (1969).

We note also that Ms. Gilleo placed her sign to be visible to passersby on the street. Streets are, of course, a traditional public forum for the exercise of First Amendment rights. This Court often has repeated the words of Justice Roberts, in *Hague v. CIO*, 307 U.S. 496, 515 (1939), that "streets and parks...time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," and "[s]uch use of the streets

and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 479-81 (1988); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Carey v. Brown*, 447 U.S. 455, 460 (1980).<sup>14</sup>

As to Ms. Gilleo's chosen mode of expression, the notion of maintaining a sign at a residence reflecting an occupant's beliefs is no modern invention. The concept dates back at least to biblical times. In Deuteronomy, 6:4-9, it is written: "Keep these words that I am commanding you today in your heart...and write them on the doorposts of your house and on your gates." *Holy Bible, New Revised Standard Version* 181 (Oxford University Press 1989).<sup>15</sup> "The posting of signs is...a time honored means of communicating a broad range of ideas and information, particularly in our cities and towns." *Vincent*, *supra*, 466 U.S. at 818-19 (1984) (Brennan, J., dissenting). "[O]utdoor signs have played a prominent role throughout American history, rallying support for

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<sup>14</sup> That the streets of Ladue may be residential, narrow or lack sidewalks does not remove them from the category of traditional public forum. *Frisby v. Schultz*, *supra*. Similarly, the fact that title to some of Ladue's residential streets may be held by private trusts, for the benefit of subdivision property owners, does not detract from the status of Ladue's streets as a traditional public forum. See *Hague v. CIO*, *supra*; *Marsh v. Alabama*, 326 U.S. 501 (1945).

<sup>15</sup> This passage is the source of the Jewish custom of displaying a *mezuzah*—a small wood or metal tube-like case containing an inscribed parchment—on the gates and doorposts of a dwelling. "[T]he *mezuzah* has become the distinctive mark of the Jewish home ...." Rabbi Ben Isaacson & Deborah Wigoder, *The International Jewish Encyclopedia* 210-11 (Prentice-Hall 1973). As an identifying device and, moreover, one which often is decorated with illustrations and Hebrew letters, a *mezuzah* would appear to be banned by Ladue's sign ordinance.

political and social causes'.<sup>7</sup> *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion), quoting lower court opinion, 26 Cal. 3d 848, 888, 610 P.2d 407, 430-31, 164 Cal. Rptr. 510, 533-34 (1980) (Clark J., dissenting).

Yard and window signs are a staple of American political campaigns. A sign "entails a relatively small expense in reaching a wide audience, allows flexibility in accommodating various formats, typographies, and graphics, and conveys its message in a manner that is easily read and understood by its reader or viewer." *Vincent, supra*, 466 U.S. at 819 (Brennan, J. dissenting). "[S]mall posters have maximum effect when they go up in the windows of homes, for this demonstrates that citizens of the district are supporting your candidate—an impact that money can't buy." Dick Simpson, *Winning Elections: A Handbook in Participatory Politics* 87 (Swallow Press 1981).

The display of a small sign constitutes virtually "pure speech," as opposed to a mixture of speech and conduct. *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505-06 (1969). The extent of permissible governmental regulation decreases as the mode of expression moves away from speech combined with conduct and towards pure speech. See *Texas v. Johnson*, 491 U.S. 397, 406 (1989); *California v. LaRue*, 409 U.S. 109, 117 (1972). Accordingly, Ms. Gilleo's mode of speech was of a form which the First Amendment renders most inviolate from government regulation.

In sum, the speech at issue here represents pure speech of a political nature on the speaker's own private residential property adjacent to a traditional public forum. On grounds of its subject matter, location and mode, Ms. Gilleo's speech

is entitled to the utmost degree of First Amendment protection. Indeed, if the First Amendment does not protect a citizen's right to maintain a small unobtrusive sign at her own home expressing her views on an important public issue, it is hard to imagine what it does protect.

This Court has devoted much attention in recent years to the degree of First Amendment protection to be afforded to various kinds of speech which some have argued lie beyond the central focus of the First Amendment. See, e.g., *Barnes v. Glen Theatre, Inc.*, \_\_\_ U.S. \_\_\_, 111 S. Ct. 2456 (1991) (nude dancing); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (commercial speech); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (indecent speech). In so doing, the Court should not become distracted from its historic commitment to protecting the kinds of political speech which all agree lie at the very core of the First Amendment. Ladue's actions here are an example of the "tyrannies of governing majorities" which the First Amendment was intended to guard against. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

Because it seems so clear that the First Amendment precludes Ladue's efforts to suppress Ms. Gilleo's speech in this case, it is tempting to eschew application of the traditional tests for determining whether a particular governmental restriction against free expression is constitutional. Were application of any such test to suggest that Ladue's sign ordinance is constitutional, that would serve only to call into question the validity of the test being applied, or the manner of its application, not the proper outcome of this case. In any event, as discussed below, Ladue's sign ordinance cannot pass constitutional muster under any recognized analytical framework.



## II. Ladue's Sign Ordinance is a Content-Based Speech Restriction which Cannot Survive the Strict Scrutiny that the First Amendment Demands.

The proper test for determining whether a governmental restriction against protected speech, on private property or in a public forum, is permissible under the First Amendment depends, in part, on whether the restriction is content-based or content-neutral. If a restriction is content-based, it must be subjected to strict scrutiny and is constitutional only if the government shows that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). See *Burson v. Freeman*, \_\_\_ U.S. \_\_\_, 112 S. Ct. 1846, 1851 (1992); *Simon & Schuster v. New York Crime Victims Bd.*, \_\_\_ U.S. \_\_\_, 112 S. Ct. 501, 509 (1991).

Ladue's sign ordinance is a content-based speech restriction. It, therefore, must withstand strict scrutiny to survive, but fails both prongs of that test.

### A. Ladue's Ordinance Is Content-Based.

#### 1. The Ordinance is Content-Discriminatory on its Face.

A restriction against speech may be content-based either because it favors or disfavors certain viewpoints, or because it discriminates among various subjects. "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980). See *Burson v. Freeman*, *supra*, 112 S. Ct. at 1850; *Arkansas Writers' Project, Inc. v. Ragland*,

481 U.S. 221, 230 (1987); *Metromedia, supra*, 453 U.S. at 519 (plurality opinion); *Carey v. Brown*, 447 U.S. 455, 462 n.6 (1980); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

On its face, Ladue's ordinance treats signs differently based on their content. Ladue has attempted to limit signs by picking and choosing among various subjects addressed by signs, allowing some and prohibiting others. For example, a 24 by 36-inch sign stating "House For Sale By Owner, Call XXX-XXXX", is permitted, while a similar sign stating "Car For Sale by Owner, Call XXX-XXXX", or containing any political message, is prohibited.

One or more one square-foot residence identification signs, or twelve square-foot driveway identification signs, stating "The Jones Family" are allowed. Indeed, it may be that such identification signs also are permitted to advertise the profession of an occupant, even though the residence is not the site of the occupant's professional practice.<sup>16</sup> However, a smaller sign in the same location stating "For Peace in the Gulf" is prohibited.

<sup>16</sup> Old Chapter 35 defined permitted residence identification signs as "[s]igns not exceeding one (1) square foot of display surface on a residence building stating only the name and profession of an occupant." Sec. 35-2(c), J.A. 27. New Chapter 35 defines such signs solely in terms of their size (Sec. 35-4(b), J.A. 122), and permits "driveway signs for ...identification" of up to twelve (12) square feet (Sec. 35-4 (c), J.A. 122), but is silent as to the permissible content of identification signs. The most reasonable interpretation of New Chapter 35 is that it continues the practice allowed under Old Chapter 35 of advertising one's profession. Had Ladue intended to terminate that practice by virtue of New Chapter 35, it likely would have so specified, since such a change probably would have required many Ladue residents to revamp existing identification signs.



A Ladue resident may display an unlimited number of twelve square-foot driveway signs for "direction" or "danger" (Sec. 35-4(c), J.A. 122), e.g., signs stating "No Trespassing", "Tradespeople Use Rear Door" or "Beware of Dog" (J.A. 59-60, 107-08). A church or school may post two sixteen square-foot signs stating "Pancake Supper Friday" or "Lecture Sunday: Say No to Abortion." Sec. 35-5, J.A. 122-23. Ms. Gilleo, however, cannot post a single much smaller sign suggesting that citizens contact their elected representatives about an issue of war and peace.<sup>17</sup>

In *City of Cincinnati v. Discovery Network, Inc.*, \_\_\_ U.S. \_\_\_, 113 S. Ct. 1505 (1993), Cincinnati sought to defend, against a First Amendment challenge, an ordinance banning newsracks distributing commercial publications from public sidewalks, while allowing similar newsracks purveying newspapers. This Court concluded that "by any common-sense understanding of the term, the ban in this case is 'content-based'" because "whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack." 113 S. Ct. at 1516-17. The same is true here. Under Ladue's sign ordinance, one must read a sign to determine whether it is allowed or prohibited.

A telling illustration of the content-discriminatory and, indeed, arbitrary nature of Ladue's sign ordinance is its

<sup>17</sup> Giving churches, religious institutions and schools more freedom to post signs than individuals cannot be justified on the basis of any zoning classification distinction since, under Ladue's zoning ordinance, schools, churches and religious institutions may be located in residential districts. Ladue Zoning Ordinance No. 1175 at 26, Ex. F to Drummond Affidavit, reproduced in Appellant's Appendix filed in the Court of Appeals August 19, 1992, Vol. I, at 183, 200 [Sec. VII(D)(1)].

treatment of flags. As discussed *supra* at pp. 8-9, the plain language of New Chapter 35, by its definition of "sign" and express reference to "banners" and "pennants," appears to ban flags.<sup>18</sup> Ladue contends, however, that all flags are permitted, irrespective of their message, so long as they are made of fabric and are not in the shape of a banner or pennant. This contention is premised on Ladue's argument that "[a] 'flag' is defined by the fabric material used in its construction and is typically square or rectangular shaped", whereas a "banner" has a "unique elongated rectangular shape", and a "pennant" is "a rectangle tapered to a single point." Pet. Br. 39.

Accepting Ladue's contention, New Chapter 35, for no discernible reason, discriminates in favor of flags made of fabric, no matter how large or numerous, and against signs of similar appearance made of paper, cardboard or plastic. We note that the ordinance contains no suggestion that a permitted flag must hang limp, flutter or be displayed in any other particular manner; accordingly, a flag may be heavily starched, stretched across a frame, affixed to the side of a building, or hung sideways. As interpreted by Ladue, then, New Chapter 35 permits a homemade sign fashioned from a

<sup>18</sup> The dictionary definition of "flag" includes "1. a piece of cloth, varying in size, shape, color, and design, usually attached at one edge to a staff or cord, and used as the symbol of a nation, state, or organization, as a means of signaling, etc.; ensign; standard; banner; pennant." *The Random House Dictionary of the English Language* 538 (Jess Stein & Laurence Urdang eds., Unabridged ed. 1981). The definition of "banner" includes "1. the flag of a country, army, troop, etc. 2. an ensign or the like bearing some device, motto, or slogan, as one carried in religious processions, political demonstrations, etc.... 4. a sign painted on cloth and hung over a street, entrance, etc." *Id.* at 117. The definition of "pennant" includes "any relatively long, tapering flag." *Id.* at 1066. See also Francis Scott Key, "*The Star Spangled Banner*" (emphasis added).

bed sheet, but prohibits smaller and neater signs not made of fabric.<sup>19</sup>

Moreover—and, again, without rational basis—Ladue's ordinance bans all signs, including flags, which are in the shape of an elongated rectangle or a pennant, even if made of cloth. Thus, for example, all athletic team and collegiate pennants are banned.

Ladue asserts that a city may permit onsite signs, *i.e.*, those pertaining to activities conducted at the site, while banning offsite signs—those containing subject matter which is not site-related—without being deemed to have engaged in impermissible content discrimination. Pet. Br. 28-29. However, whether a sign is allowed or prohibited under Ladue's sign ordinance does not turn on any onsite/offsite distinction. Ms. Gilleo's sign expressing her personal views, and displayed at her residence to try to persuade others to adopt those views, falls into the onsite category, as would a sign announcing a "For Peace in the Gulf" phonathon or letter-writing gathering at Ms. Gilleo's home. Nevertheless, Ladue prohibits such signs. At the same time, Ladue accords the right to display onsite signs concerning their activities to churches, schools and religious institutions.

Ladue does allow its residents to maintain onsite commercial signs concerning the sale or lease of real estate. However, Ladue prohibits a resident from displaying a sign as part of an effort to sell an automobile or other property

<sup>19</sup> Many signs contain graphics and symbols, and many flags contain verbal as well as symbolic messages. For example, the flag of Saudi Arabia reads: "There is no God but Allah, Muhammad is the Prophet of Allah." Mauro Talocci, *Guide to the Flags of the World* 69 (Whitney Smith ed. 1982). The flag of Iowa reads: "Our Liberties We Prize and Our Rights We Will Maintain." *Id.* at 180.

maintained at his or her residence. All such signs are onsite signs. Also, as previously noted, Ladue may allow its residents to maintain driveway and residence identification signs advertising their professions, which constitute offsite commercial signs since Ladue's zoning ordinance does not allow professionals to conduct their practices in residential districts.<sup>20</sup>

Thus, Ladue permits some onsite signs and some offsite signs while banning others in both categories. What Ladue has done is to pick and choose *by subject matter* which kinds of signs it will allow and which it will not. Ladue's regulatory scheme, accordingly, is wholly antithetical to the First Amendment. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, *supra*, 408 U.S. at 95.

*Amici* National Institute of Municipal Law Officers, *et al.* criticize the court of appeals for supposedly utilizing a "rigid, formalistic analysis" to determine that New Chapter 35 is content-based (Br. 4). However, this criticism is not well founded. Neither respondent's position, nor the reasoning of the court below, is grounded in the ordinance's allowance of signs like traffic signs, street signs or house numbers. Moreover, a strict analysis is exactly what the First Amendment requires. Neither a municipal government nor a court may impose its own value system with respect to protected speech, decreeing that some speech categories are important and will be allowed, while others are unimportant and may be banned.

<sup>20</sup> See Ladue Zoning Ordinance No. 1175, *supra* note 17, at 4-5, 8-9.



Finally, no less rigid analysis would salvage the constitutionality of Ladue's sign ordinance. The exceptions to Ladue's general sign ban are by no means insignificant. The nature and breadth of the permitted signs demonstrate that Ladue has done precisely what the First Amendment forbids; it has selected the appropriate subjects for public discourse via signs. Moreover, Ladue has adopted a value system wholly at odds with the values inherent in the First Amendment. It has prohibited political speech, the most protected form of expression, while allowing other less protected forms of speech. Ladue's ordinance is content-discriminatory on its face.<sup>21</sup>

## 2. Ladue's Ordinance is Content-Based Under the Principles of the Plurality Opinion in *Metromedia v. City of San Diego*.

Ladue's sign ordinance also is impermissibly content-based under the principles of the plurality opinion in *Metromedia*, *supra*, 453 U.S. 490. In the plurality's view, the San Diego billboard ordinance at issue in *Metromedia*

<sup>21</sup> The record also contains indicia of viewpoint discrimination. For example, viewed against the general backdrop of Ladue's ordinance, the fact that an American flag may be easily obtained and displayed suggests a bias in favor of patriotic speech. Also suggestive of viewpoint bias is Ladue's almost phobic aversion to "controversial" signs," as discussed *supra* at pp. 4-5 & nn.2-4 and *infra* at pp. 32-33 & n.25. See, e.g., *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 812 (1985) ("concern to avoid controversy...may conceal a bias against the viewpoint advanced by the excluded speakers"). Similarly, with respect to the manner in which the ordinance has been enforced, there is evidence of yellow ribbons being displayed in Ladue during the Persian Gulf War (J.A. 190-92), and of the earlier display of signs like a Santa Claus sign and "Happy Birthday" yard cards (J.A. 62-63), with no corresponding evidence of any enforcement action against those types of signs.

permitted onsite commercial billboards but prohibited onsite noncommercial billboards. 453 U.S. at 513. On that basis, a constitutional flaw identified in the ordinance was that it accords "a greater degree of protection to commercial than to noncommercial speech," and thereby "inverts" the principle that "noncommercial speech [is accorded] a greater degree of protection than commercial speech." 453 U.S. at 513.

That it is constitutionally impermissible to favor commercial speech over noncommercial speech was not a radical concept invented by the *Metromedia* plurality. It was merely an application of the principle, articulated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980), that the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." See also *United States v. Edge Broadcasting Co.*, \_\_\_ U.S. \_\_\_, 113 S. Ct. 2696, 2705 (1993); *Edenfield v. Fane*, \_\_\_ U.S. \_\_\_, 113 S. Ct. 1792, 1798 (1993); *Discovery Network*, *supra*, 113 S. Ct. at 1514-16; *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 477 (1989). We are aware of no decision granting commercial speech greater protection than noncommercial speech, which is in effect what Ladue seeks in this case.

In *Discovery Network*, this Court held that the lesser constitutional protection accorded to commercial speech did not permit Cincinnati to ban commercial newsracks as a means of addressing aesthetic and traffic safety concerns associated with all newsracks, including those of a noncommercial nature. Surely, then, *Discovery Network* also means that Ladue cannot seek to address concerns arising from commercial and noncommercial signs alike by banning noncommercial signs while permitting commercial signs.



Accordingly, the principles articulated by the plurality in *Metromedia*, and relied on by the lower courts in this case, remain sound.<sup>22</sup>

### 3. Ladue Cannot Recast its Content-Based Ordinance as Content-Neutral Under the Secondary Effects Doctrine.

Ladue attempts to transmogrify its content-based ordinance into a content-neutral regulation based on the "secondary effects" doctrine articulated in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). However, Ladue's secondary effects argument fails for several reasons.

a. Ladue contends that its sign ordinance should be deemed content-neutral because it is aimed not at the content of signs but at certain secondary effects allegedly flowing from signs, *i.e.*, visual blight, adverse effects on traffic safety, and intrusions upon residential privacy. That argument, however, is foreclosed by *Discovery Network, supra*, 113 S. Ct. 1505. There, Cincinnati contended that its selective ban against commercial newsracks should be deemed content-neutral under *Renton* because it was intended not to suppress the content of commercial publications but to address aesthetic and safety concerns impacted by an overabundance of newsracks. The Court rejected Cincinnati's secondary effects argument on grounds that there were "no secondary effects attributable to respondent publishers'

<sup>22</sup> The fact that a Missouri statute, Mo. Rev. Stat. § 67.317 (1986), prohibits political subdivisions from forbidding or restricting real estate signs does not make Ladue's sign ordinance any less content-discriminatory. Neither the State alone, nor the State acting in conjunction with Ladue, may restrict speech to any greater degree than may Ladue acting alone.

newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks." 113 S. Ct. at 1517.

Here, likewise, to the extent, if any, that small signs adversely impact the aesthetic, safety or privacy interests relied on by Ladue, such impact arises to the same degree from the signs permitted by Ladue's ordinance. An 8½ by 11-inch window sign stating "For Peace in the Gulf" produces no greater visual blight, traffic safety problems or intrusion upon residential privacy than a two-foot by three-foot "For Sale" sign.

Ladue contends that the signs banned under its ordinance "proliferate" (Pet. Br. 2 and *passim*), while those permitted "are naturally limited in number" (Pet. Br. 23). That argument, however, is belied by the fact that Ladue has deemed it necessary to enact numerical, as well as size and location, restrictions for various of the signs permitted under its ordinance, including real estate signs, commercial signs, and signs for churches, religious institutions and schools. See *supra* at pp. 6-7, nn.6-8. Moreover, the other types of signs permitted under Ladue's ordinance without numerical limitation—*e.g.*, residence and driveway identification signs, driveway signs containing an infinite variety of warnings or directions, and flags—are no less (or more) likely to proliferate than are the signs banned by Ladue's ordinance.

Signs do not naturally proliferate. People put them up. The number of signs banned by Ladue's ordinance that would be posted in the absence of a ban would be limited by the same forces that limit the number of signs permitted under the ordinance—the good judgment and self-interest of Ladue's residents. As this Court stated in *Vincent*, "private property owners' esthetic concerns will keep the posting of signs on their property within reasonable bounds." 466 U.S. at 811. Indeed, Ladue's entire position in this case is self-

defeating. If, as Ladue asserts, most of its residents do not want signs, the fact that they are permitted will not result in a proliferation of signs. Ms. Gilleo asks only that signs be allowed, not required.<sup>23</sup>

b. Ladue's secondary effects argument also fails because the impact from signs which Ladue seeks to avoid is not secondary in nature. In *Renton*, this Court upheld an

<sup>23</sup> Ladue contends, wrongly, that the conclusions contained in the Drummond Affidavit, concerning the likelihood of sign proliferation in Ladue absent restrictions, must be accepted at face value. Pet. Br. 21. Mr. Drummond's conclusions are conjecture and opinion which add little to this case and do not preclude summary judgment in favor of Ms. Gilleo. See *Edenfield v. Fane*, \_\_\_ U.S. \_\_\_, 113 S. Ct. 1792, 1800-01 (1993); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 673 (D.C. Cir. 1977). Indeed, we doubt that Mr. Drummond's opinions even constitute admissible evidence. Any question as to the likelihood of sign proliferation in Ladue absent restrictions is best resolved by empirical evidence, not expert conjecture. See Fed. R. Evid. 701-03.

The main empirical evidence in the record concerning Ladue is the Affidavit of Nancy R. Sachs (J.A. 190), discussed *supra* at pp. 9-10, n.12. Ladue's only corresponding empirical submission consisted of statements by Mayor Spink, in her initial affidavit, that she had observed "Jay Levitch —50—Happy Birthday" signs at nine locations in February, 1991. J.A. 180. Significantly, however, eight of the nine signs were on utility poles on public property; only one was on private property. See Spink Aff. Exs. T-BB; Appellants' Appendix filed in the court of appeals August 19, 1992, Vol. II, Index (describing Spink Aff. Exs. T-BB). Beyond that, Ladue submitted a videotape as Exhibit HH to the Supplemental Affidavit of Edith J. Spink (J.A. 197), depicting a smattering of election signs posted in the cities of Brentwood and Clayton, Missouri, on a date less than two weeks prior to scheduled municipal elections. This tape merely demonstrates that even at the height of the political campaign season, political signs are limited in number and harmless.

ordinance restricting the location of adult theaters because it was aimed not at the content of the sexually explicit speech purveyed at those theaters, but at certain "secondary," or indirect, effects shown to stem from adult theaters. Here, by contrast, Ladue's ordinance is concerned with the direct, primary aspects of the expressive activities sought to be suppressed. What Ladue wants to prohibit is signs themselves, not some indirect effects resulting from signs. As this Court stated in *Vincent*, 466 U.S. at 810:

With respect to signs posted by appellees, however, it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape.... Here, the substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself.

c. Ladue's secondary effects argument further is defective because it is based on viewers' reactions to signs. This Court has made clear that "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*." *Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality opinion). "The emotive impact of speech on its audience is not a 'secondary effect.'" *Id.* See *R.A.V. v. City of St. Paul*, \_\_\_ U.S. \_\_\_, 112 S. Ct. 2538, 2549 (1992); *Forsyth County, Georgia v. Nationalist Movement*, \_\_\_ U.S. \_\_\_, 112 S. Ct. 2395, 2403-04 (1992).

The fact that Ladue's ordinance is based, at least in part, on viewers' reactions is demonstrated by Ladue's repeated assertions of "privacy" interests as a justification for its sign ordinance, both in the preamble to New Chapter 35 (J.A. 116-19) and throughout its brief (e.g., pp. 2, 11, 26, 44). The asserted privacy interests can refer to nothing other than a desire on the part of certain Ladue residents not to be confronted with signs bearing messages which they deem



controversial. This is confirmed not only by the testimony discussed *supra* at pp. 4-5 & nn.2-4, but also by additional testimony from Ladue's witnesses.

Thomas Remington (the President of Ladue's City Council) testified, on deposition, to his belief that people come to Ladue "to obtain the peace and privacy [of]...an area of largely private streets where you're somewhat insulated from the controversies of the street corner." J.A. 47. He opined that people in Ladue "do not want to be captive audiences for neighborly disputes whether they're on a national scale, such as the Persian Gulf, or whether they're on the closing of Litzinger Road." J.A. 49.

Sally H. Gulick, a resident and trustee of Ms. Gilleo's subdivision, testified, on deposition, "I personally feel that I do not care to come home and see signs on people's yards with their opinions expressed on them." J.A. 61.<sup>24</sup> Ms. Gulick further testified that she did not find objectionable a sign displayed at a house several doors down from Ms. Gilleo's stating "Dear Santa, Julie lives here" (J.A. 62), but did object to Ms. Gilleo's sign for the principal reason that it is controversial (J.A. 63). In addition, she testified to having conferred with the two other trustees of Ms. Gilleo's and her subdivision, and that all three trustees agreed that they did not want signs in their subdivision that contained an opinion. J.A. 64.<sup>25</sup>

<sup>24</sup> Ms. Gulick signed an affidavit filed by Ladue in the district court, and testified on behalf of Ladue at the preliminary injunction hearing. J.A. 60, 102.

<sup>25</sup> Ms. Gulick also testified that at a neighborhood meeting, Mr. Remington referred to the controversial nature of Ms. Gilleo's yard sign as possibly leading to vandalism in the neighborhood, and that being

That viewers may find speech like Ms. Gilleo's controversial is not a sufficient reason for suppressing it. "[T]he use of the 'controversial' nature of speech as the touchstone for its regulation threatens a value at the very core of the First Amendment, the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open.'" *Consolidated Edison Co.*, *supra*, 447 U.S. at 548 n.9, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).<sup>26</sup>

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a good reason for opposing the sign. J.A. 65-66. She also recalled two of her neighbors expressing opposition to the sign at the meeting because they objected to the contents and to Ms. Gilleo's views on the Persian Gulf. J.A. 66. Ms. Gulick also testified that she was willing to put up with an ugly for-sale sign, but not an ugly sign that states somebody's opinion. J.A. 62.

<sup>26</sup> While, in light of the many other flaws in Ladue's position, the Court need not reach this point, we further submit that the secondary effects doctrine should be deemed wholly inapplicable to this case. The secondary effects test was conceived in *Renton* to address problems relating to businesses purveying sexually explicit materials. While this Court has indicated, without necessarily deciding, that the doctrine may be utilized in other contexts, see *Discovery Network*, *supra*, 113 S. Ct. at 1517; *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Boos v. Barry*, *supra*, 485 U.S. at 320-21 (plurality opinion); the Court never has squarely applied the secondary effects rationale to political speech. For the Court to do so "creates a possible avenue for governmental censorship whenever censors can concoct 'secondary' rationalizations for regulating the content of political speech." *Boos v. Barry*, *supra*, 485 U.S. at 335 (Brennan, J., concurring). Left unchecked, the secondary effects doctrine "could set the Court on a road that will lead to the evisceration of First Amendment freedoms." *Id.* at 338. We echo Justice Brennan's "hope that, when the Court is actually presented with a case involving a content-based regulation of political speech that allegedly aims at so-called secondary effects of that speech, the Court will recognize and avoid the pitfalls of the *Renton* approach." *Id.* See also, Geoffrey R.



## B. Ladue's Ordinance Fails Strict Scrutiny.

As a content-based speech restriction, Ladue's ordinance must be subjected to the "compelling state interest" and "narrowly drawn" tests which comprise strict scrutiny, and satisfies neither.

### 1. Ladue's Ordinance is Not Necessary to Further a Compelling State Interest.

To justify a restriction against speech under strict scrutiny, it is not enough that the government identify some interest falling within the sphere of legitimate government concern. Rather, the asserted interest must be a compelling one. "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939), quoted in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 69 (1981). Moreover, the government "must demonstrate that its law is necessary to serve the asserted interest." *Burson v. Freeman*, *supra*, 112 S. Ct. at 1852 (emphasis added).<sup>27</sup>

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Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 115-17 (1987); Floyd Abrams, *Content Neutrality: Some Thoughts on Words and Music*, 10 Harv. J.L. & Pub. Pol'y 61 (1987).

<sup>27</sup> The government has the burden "to articulate, and support, a reasoned and significant basis for its decision." *Schad*, *supra*, 452 U.S. at 77 (Blackmun, J., concurring). "[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment." *Id.*

Ladue's asserted justifications for its sign ordinance warrant particularly close scrutiny in light of their genealogy. Old Chapter 35 contained no findings or statement of purpose. J.A. 26. The first statement of the supposed purposes underlying Ladue's sign ordinance appeared in the preamble to New Chapter 35, adopted fourteen days after the district court invalidated Old Chapter 35, and drafted by Ladue's litigation counsel in this case.<sup>28</sup> The remaining justifications for Ladue's sign ordinance come from three affidavits that also were generated during the course of this litigation.

Not surprisingly, the preamble and affidavits purport to justify, on a *post-hoc* basis, the precise regulatory scheme maintained by Ladue. Whether a sign is "naturally limited in number" (Pet. Br. 23) and thus permitted, or supposedly proliferates and is banned, turns not on any logical or evidentiary basis, but on whether such sign is permitted or prohibited under the terms of Ladue's sign ordinance. Ladue has done exactly what Justice Brennan, in his dissenting opinion in *Vincent*, warned might happen were government officials permitted to restrict expression in the name of aesthetics:

[W]hen a total ban is justified solely in terms of aesthetics, the means inquiry necessary to evaluate the constitutionality of the ban may be impeded by deliberate or unintended government manipulation. Governmental objectives that are purely aesthetic can usually be expressed in a virtually limitless variety of ways. Consequently, objectives can be tailored to fit whatever

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<sup>28</sup> See Invoice 62278 dated February 25, 1991, to City of Ladue from Armstrong, Teasdale, Schlafly, Davis & Dicus, Exhibit 1 to Application of Plaintiff's Counsel, Green, Hoffmann & Dankenbring, for Attorney's Fees and Expenses, filed in the district court October 21, 1991.

program the government devises to promote its general aesthetic interests. Once the government has identified a substantial objective and has selected a preferred means of achieving its objective, it will be possible for the government to correct any mismatch between means and ends by redefining the ends to conform with the means.

466 U.S. at 825.

The interests identified by Ladue as supporting its ordinance—aesthetics, traffic safety and privacy—are not of sufficient magnitude within the context of this case to constitute compelling state interests. Neither this Court nor any other, to our knowledge, has held aesthetic concerns to be sufficient to warrant a ban against pure political speech on private property adjacent to a traditional public forum;<sup>29</sup> and it is hard to imagine such a holding, particularly in the context of a small unobtrusive sign displayed at a citizen's own home expressing her views on an important public issue.<sup>30</sup> As Justice Brennan stated in *Metromedia*, "I do not doubt that '[i]t is within the power of the [city] to determine that the community should be beautiful,'...but that power may not be exercised in contravention of the First Amend-

<sup>29</sup> To the contrary, a number of cases have invalidated aesthetics-motivated bans against political signs. See, e.g., *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985); *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976), cert. denied, 431 U.S. 913 (1977).

<sup>30</sup> Even were Ladue assumed to have the strongest possible aesthetic interests, we fail to see how such interests are at all impacted by an 8½ by 11-inch sign inside a window of Ms. Gilleo's home. Accordingly, under any circumstances, Ladue's sign ordinance is unconstitutional as applied to Ms. Gilleo.

ment." 453 U.S. at 530 (concurring opinion), quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954).<sup>31</sup>

As to Ladue's asserted interest in traffic safety, there is nothing in the record demonstrating any connection between small signs and traffic safety, let alone establishing such a substantial connection that the interest may be deemed compelling.<sup>32</sup> This case presents just another example of a municipality using traffic safety as a pretext to try to justify a regulation which in fact is motivated by aesthetic concerns. See *Metromedia*, supra, 453 U.S. at 528-29 n.7 (Brennan, J., concurring) ("[I]n the case of billboard regulations, many cities may have used the justification of traffic safety in order

<sup>31</sup> Ladue's attempt to equate its aesthetic interests to those of Williamsburg, Virginia is fallacious. In *Metromedia*, "the parties acknowledge[d] that a historical community such as Williamsburg, Va. should be able to prove that its interest in aesthetics and historical authenticity are sufficiently important that the First Amendment value attached to billboards must yield." 453 U.S. at 534 (Brennan, J., concurring). However, the parties surely were referring to restrictions against billboards, not small yard or window signs, and, moreover, to billboard restrictions extending not throughout the entire city of Williamsburg, but only to the historic section of Colonial Williamsburg, which comprises only a small part of the city. Colonial Williamsburg is essentially an outdoor museum. As such, it does not constitute a traditional public forum, and the government has much more leeway to regulate speech there. See, e.g., *International Soc'y for Krishna Consciousness, Inc. v. Lee*, \_\_\_ U.S. \_\_\_, 112 S. Ct. 2701, 2705-06 (1992).

<sup>32</sup> The flimsy nature of Ladue's traffic safety argument is typified by the testimony of Mark Arnold, a witness for Ladue at the preliminary injunction hearing. Mr. Arnold expressed concern that someone might vandalize a controversial sign in his subdivision, the police might be called, and the vandal might attempt a vehicular escape through Mr. Arnold's driveway, thereby imperiling his young son and golden retriever, who play in the driveway. J.A. 99.



to sustain ordinances where their true motivation was aesthetics.").

With respect to privacy, Ladue's asserted interest not only is illegitimate because it pertains to viewers' reactions (*see supra* at pp. 31-33), it is unavailing for other reasons as well. A residential privacy interest is implicated only where speech intrudes into the home or is unduly coercive in nature. "[T]he ability of government 'to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.'" *Consolidated Edison Co.*, *supra*, 447 U.S. at 541, quoting *Cohen v. California*, 403 U.S. 15, 21 (1971). No basis exists for suppressing speech where the party asserting a residential privacy interest "is not attempting to stop the flow of information into his own household, but to the public." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971).

Ms. Gilleo's sign remained silently on her own property. It was not tantamount to a sound truck bombarding listeners with loud, raucous noise. *Compare Kovacs v. Cooper*, 336 U.S. 77 (1949). Nor was it like targeted picketing outside a particular residence, designed to cause psychological harm to those within. *Compare Frisby v. Schultz*, *supra*, 487 U.S. 474. Anyone preferring not to view Ms. Gilleo's sign could avoid doing so by averting his or her eyes. "[T]he burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-211 (1975), quoting *Cohen v. California*, *supra*, 403 U.S. at 21. *See Spence v. State of Washington*, 418 U.S. 405, 412 (1974)

("Anyone who might have been offended could easily have avoided the display.").

<sup>33</sup>

## 2. Ladue's Ordinance is Not Narrowly Drawn.

Even were Ladue able to satisfy the compelling state interest test, it further must show that its ordinance is "narrowly drawn," *i.e.*, that it is the least restrictive means of achieving its purposes. *Boos v. Barry*, 485 U.S. 312, 329 (1988). *See Ward v. Rock Against Racism*, 491 U.S. 781, 798 n.6 (1989).

Except, perhaps, for its illegitimate privacy argument, Ladue has not seriously maintained that Ms. Gilleo's particular sign adversely impacts any of Ladue's municipal interests. Rather, Ladue's asserted concern is a fear of an uncontrolled proliferation of signs. To address this concern, Ladue has banned virtually all signs, except those it happens to favor.

There are a number of less restrictive alternative regulatory approaches available. Ladue might adopt reason-

<sup>33</sup> Ladue's argument concerning "captive audiences" (Pet. Br. at 44-45) derives from cases which are wholly distinguishable. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), concerned a city's right to control advertising on city-owned buses and streetcars, which were deemed not to constitute a public forum. *Packer Corp. v. Utah*, 285 U.S. 105 (1932), involved a challenge on grounds other than the First Amendment to limitations on tobacco advertising by billboard or placard. As to Ladue's argument concerning a homeowner's "right to be free from picketing that disturbs 'the sanctity of the home'" (Pet. Br. 45, quoting *Frisby v. Schultz*, *supra*, 487 U.S. at 484), we note, in addition to the matters discussed above, that "we must be careful not to confuse sanctity with silence." *Burson v. Freeman*, *supra*, 112 S. Ct. at 1866 (Stevens, J., dissenting). A sign may be a nuisance to some, but it is also a manifestation "of a vibrant democracy." *Id.* at 1867.



able restrictions governing the size of signs, the number of signs that may be displayed on a piece of property at one time, or where on the property such signs may be placed. Ladue might reasonably limit the overall number of signs that may be on display within the city, or a particular subdivision, at one time; or reasonably regulate the period of time that signs might be displayed.

Instead, Ladue has adopted the *most restrictive* approach of banning virtually an entire mode of speech throughout the city. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963), quoted in *Edenfield v. Fane*, *supra*, 113 S. Ct. at 1803-04. Ladue's ordinance has all the precision of a meat-ax.

This case is closely analogous to *Schneider v. New Jersey*, *supra*, in which the Court held that a ban against distribution of handbills was not a permissible means of preventing littering because "[t]here are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." 308 U.S. at 162. Similarly analogous is *Martin v. City of Struthers*, 319 U.S. 141 (1943), in which the Court held that banning door-to-door solicitation was not an allowable means of protecting residential privacy and deterring crime because there were less restrictive means of addressing those problems, *e.g.*, prohibiting solicitation at homes where the owner has manifested a desire not to receive solicitors, and requiring solicitors to have identification devices. *Id.* at 146-49. Ladue's ordinance is not narrowly drawn.

### III. Ladue's Sign Ordinance is Unconstitutional Even if Viewed as Content-Neutral.

#### A. Ladue's Ordinance is an Unjustified Ban Against a Mode of Political Expression.

Assuming *arguendo* that Ladue's sign ordinance is content-neutral, it nonetheless imposes virtually a complete ban against small signs as a medium of expression within Ladue. Where a speech restriction is content-neutral, but operates to ban a mode of expression as opposed to merely regulating the time, place and manner of speech, such a restriction must survive a level of scrutiny closely akin to strict scrutiny to be constitutional. It must be necessary to "further a sufficiently substantial government interest" and be "narrowly drawn." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981). See *Martin v. City of Struthers*, *supra*; *Schneider v. New Jersey*, *supra*; *Metromedia*, *supra*, 453 U.S. at 527 (Brennan, J., concurring).<sup>34</sup>

<sup>34</sup> The level of required scrutiny remains high even assuming Ladue's sign ban to be content-neutral because the ordinance drastically reduces the *quantity* of political and other speech otherwise permissible in Ladue. The First Amendment is concerned not only with ensuring that public debate not be distorted by content-discriminatory governmental regulations, but also with ensuring an adequate quantity of public debate. See, *e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 18-19 (1976) ("contribution and expenditure limitations impose direct quantity restrictions on political communication and association"). See generally Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 57-71 (1987). Also, a content-neutral regulation does not necessarily affect all speakers equally. See, *e.g.*, *International Soc'y for Krishna Consciousness, Inc. v. Lee*, *supra*, 112 S. Ct. at 2720 (Kennedy, J., concurring) ("A grant of plenary power allows the government to tilt the dialogue heard by the public, to exclude many, more marginal voices."); *Burson v. Freeman*, *supra*, 112 S. Ct. at 1864 (Stevens, J., dissenting) ("Tennessee's content-based discrimin-

For the same reasons as discussed *supra* at pp. 34-40, even assuming Ladue's ordinance to be content-neutral, Ladue has made no showing that could justify virtually a complete ban against small signs as a medium of expression in Ladue and, in particular, a ban against signs containing political speech. Ladue's ordinance is not necessary to fulfill governmental interests which are sufficiently substantial, and is not narrowly drawn.<sup>35</sup>

**B. Ladue's Ordinance Cannot be Justified as a Content-Neutral Regulation of Time, Place and Manner of Speech.**

Where a speech restriction is content-neutral and only limits the permissible time, place and manner of speech, rather than banning a mode of expression, it will be deemed constitutional if it is "narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication." *Perry Educ. Ass'n, supra*, 460 U.S. at 45. See *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989). Ladue seeks to validate its ordinance under this framework; however, its efforts fail for several reasons.

1. As discussed previously, Ladue's sign ordinance is not content-neutral, and does not regulate the time, place and manner of speech. Signs prohibited in Ladue are prohibited "at any time, at any place, and in any manner." *Lovell v.*

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ation is particularly problematic because such a regulation will inevitably favor certain groups of candidates.").

<sup>35</sup> It is not entirely clear from this Court's precedents whether the level of scrutiny applicable in the above context is identical to strict scrutiny or slightly less strict. See *Stone, Content-Neutral Restrictions*, cited *supra* at p. 41 n.34, at 64-71. In either event, the analysis and conclusions applicable in this case are the same.

*City of Griffin*, 303 U.S. 444, 451 (1938). See *United States v. Grace*, 461 U.S. 171, 181 (1983) (ban on specified communicative activity on public sidewalks around Supreme Court grounds "cannot be justified as a reasonable place restriction"); *Metromedia, supra*, 453 U.S. at 516 (plurality opinion) (rejecting suggestion that ordinance is time, place and manner restriction because "[s]igns that are banned are banned everywhere and at all times").

Further, Ladue's ordinance is not narrowly tailored. See *supra* at pp. 39-40. While the narrowly tailored requirement in the time, place and manner context may not be as stringent as under strict scrutiny, see *Board of Trustees v. Fox, supra*, 492 U.S. at 476-480; *Ward, supra*, 491 U.S. at 797-800; the test is not "overly permissive." *Fox, supra*, 492 U.S. at 480. It means that the government may not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward, supra*, 491 U.S. at 799. Put another way, "the means chosen [may not be] substantially broader than necessary to achieve the government's interest." *Id.* at 800. There must be a "reasonable fit" between the government's asserted interests and "the means chosen to serve those interests." *Discovery Network, supra*, 113 S. Ct. at 1510. See *Fox, supra*, 492 U.S. at 480.

Ladue addresses a concern that signs might proliferate, not by adopting reasonable regulations limiting their number, size, point of placement or duration of display, but by banning most signs throughout the city, except those which Ladue favors. Moreover, Ladue takes this broad-brush approach against disfavored signs even though permitted signs produce the same effects as signs that are banned. Ladue's sign ordinance thus burdens substantially more speech than necessary to serve its asserted interests, and



there is a lack of a reasonable fit between Ladue's desired ends and chosen means.

Ladue's ordinance further fails the time, place and manner test because it does not leave open ample alternative channels of communication.<sup>36</sup> Ladue's argument to the contrary ignores the unique aspects of signs as a mode of expression, as discussed *supra* at pp. 17-18. Ms. Gilleo acquired her yard sign for \$4.00 (J.A. 42), and spent no more than two or three minutes hammering it into the ground (J.A. 78). No doubt, the placement of her window sign required similarly little time, effort and expense. All of the alternatives put forth by Ladue are more expensive, more time consuming or less effective than the mode of communication chosen by Ms. Gilleo. Accordingly, Ladue's postulated substitutes are not adequate alternatives. See *Linmark Associates, Inc. v. Township of Williamsboro*, 431 U.S. 85, 93 (1977); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, \_\_\_ U.S. \_\_\_, 112 S. Ct. 2711, 2727 (1992) (Souter, J., concurring and dissenting).

<sup>36</sup> Ladue contends that this issue was not raised before the Eighth Circuit and, therefore, may not be raised here. Pet. Br. 40 n.11. Ladue is wrong both factually and legally. Throughout these proceedings, Ladue has sought to justify its ordinance under the time, place and manner test, an integral component of which is whether the regulation leaves open ample alternative channels of communication. Accordingly, the issue of alternative channels was squarely before the Court of Appeals. See, e.g., Appellants' Brief, filed in the Court of Appeals August 19, 1992, at 25, 40-41. Moreover, respondent specifically addressed the point at oral argument. Further, it is not even necessary that the point have been raised below for it to be asserted here, since Ms. Gilleo is entitled to defend the judgment on any grounds supported by the record, whether or not specifically raised below. See, e.g., *Bondholders Committee v. Commissioner of Internal Revenue*, 315 U.S. 189, 192 n.2 (1942).

In *Linmark*, this Court held that real estate signs could not be banned, despite the availability of alternative advertising means, because some of the suggested alternatives are not used to market real estate "in practice," and others "may be less effective media for communicating the message." 431 U.S. at 93. Here, similarly, small signs displayed at a residence are a traditional and ideal means of expressing the occupants' support for political candidates, or personal views on other public issues, for which there is no equivalent substitute.

This Court, in voiding an ordinance banning door-to-door distribution of literature in *Martin v. Struthers*, *supra*, observed that "[d]oor-to-door distribution is essential to the poorly financed causes of little people." 319 U.S. at 146. These words are a poignant reminder of the importance of according constitutional protection to a mode of expression like small signs which "is a relatively inexpensive, highly convenient, and markedly effective outlet for the promulgation of ideas and information by persons who do not themselves have access to more traditional media facilities." Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 Sup. Ct. Rev. 233, 257.

2. In advancing its time, place and manner argument, Ladue places great reliance on *Vincent*; however, that reliance is misplaced. Of central importance in *Vincent* was that the utility pole wires on which signs were placed were deemed not to be a public forum. 466 U.S. at 813-814. Governments have far greater latitude to restrict speech on "[p]ublic property which is not by tradition or designation a forum for public communication." *Id.* at 814-15.

Moreover, the Court viewed the regulation at issue in *Vincent* as unquestionably content-neutral. 466 U.S. at 804.



Also, the regulation was not a total ban against signs anywhere in the city, but only a restriction against placing them on utility poles on public property. The Court noted that "by not extending the ban to all locations, a significant opportunity to communicate by means of temporary signs is preserved." *Id.* at 811.

*Vincent*, therefore, is readily distinguishable from this case on at least three grounds. *Vincent* concerned a content-neutral regulation of the time, place and manner of speech in a non-public forum, whereas this case presents a content-based ban against a mode of expression on private property adjacent to a traditional public forum. Accordingly, *Vincent* does not compel a conclusion that Ladue's sign ordinance is constitutional.

#### IV. This Case has Little, if Anything, to do with the Federal Highway Beautification Act.

Ladue contends that "[t]he lower courts' opinions jeopardize the constitutionality of the Highway Beautification Act of 1965," Pub. L. 85-767, 72 Stat. 904 (codified as amended at 23 U.S.C. § 131 (1988 & Supp. IV 1992)). Pet. Br. 48. Ladue thus seeks to accomplish by indirection what it cannot do directly. Having failed to sustain the constitutionality of its sign ordinance under any recognized analytical framework, Ladue tries to raise fears of how a decision in this case might be applied in a different context.

Ladue's Highway Beautification Act argument is a red herring. We assert no challenge here, and raised none below, to the constitutionality of the Highway Beautification Act. Moreover, the Act and Ladue's sign ordinance, and the respective communication modes to which they are addressed, are so dissimilar that this case has little, if any, relevance to any questions arising under the Act.

In contrast to Ladue's sign ordinance, the Act does not impose a total ban against a particular mode of expression throughout a political subdivision. The Act merely regulates the placement of billboards in proximity to federal highways. 23 U.S.C. § 131 (b)-(d). Also, the Act's restrictions have no application in commercial or industrial areas. 23 U.S.C. § 131 (d). Accordingly, the Act is a time, place and manner regulation.

Moreover, with respect to distinctions based on content, the Act reflects a very different regulatory scheme than that contained in Ladue's ordinance. Unlike Ladue's ordinance (*see* discussion *supra* at pp. 24-25), the Act essentially allows onsite signs, while prohibiting offsite signs. 23 U.S.C. § 131 (c). *See Wheeler v. Commissioner of Highways*, 822 F.2d 586, 593 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988). A regulation distinguishing between onsite and offsite signs is not necessarily content-discriminatory. *See Discovery Network, supra*, 113 S. Ct. at 1514 n.20.

Further, the Act is concerned with billboards whereas Ladue's ordinance extends to small signs. While certain parallels exist between small signs and billboards, there are important differences. "[W]hatever its communicative function, the billboard remains a 'large, immobile, and permanent structure which like other structures is subject to ...regulation.'" *Metromedia, supra*, 453 U.S. at 502 (plurality opinion), quoting lower court opinion, 26 Cal. 3d at 870, 610 P.2d at 419, 164 Cal. Rptr. at 522.

Indeed, in *Metromedia*, it was settled even before the case arrived in this Court that the San Diego ordinance restricting "outdoor advertising display signs" should be construed as not extending to "a small sign placed in one's front yard proclaiming a political or religious message." 26

Cal. 3d at 857 n.2, 610 P.2d at 410 n.2, 164 Cal. Rptr. 513 n.2. Noting that such signs "present no significant aesthetic blight or traffic hazard" and are "of a character very different from commercial billboards," the California Supreme Court adopted a narrowing construction "to avoid the risk of unconstitutional overbreadth which a broad construction of the ordinance might entail." *Id.* See 453 U.S. at 494 n.2 (plurality opinion).

This Court repeatedly has recognized that "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." *Metromedia, supra*, 453 U.S. at 501 (plurality opinion) (footnote omitted). See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). Billboards are to small window or yard signs what sound trucks are to quiet conversation. Accordingly, the legal principles pertaining to small signs and billboards are not necessarily interchangeable.

## CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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December 14, 1993

## **APPENDIX**



1a



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2a



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

CITY OF LADUE, EDITH J. SPINK, MAYOR OF THE CITY  
OF LADUE, THOMAS R. REMINGTON, GEORGE L.  
HENSLEY, GALE F. JOHNSTON, JR., ROBERT A. WOOD,  
ROBERT D. MUDD, JOYCE T. MERRILL, AS MEMBERS  
OF THE CITY COUNCIL OF THE CITY OF LADUE,

*Petitioners,*

v.

MARGARET P. GILLES,

*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS

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## REPLY BRIEF FOR THE PETITIONERS

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Respondent's submission ignores the unique and extraordinary Record about the City of Ladue, a carefully planned 8.5 square mile residential community that was designed by Harland Bartholomew, a nationally renowned land-use expert. Since its founding in 1936, Ladue has made a longstanding and comprehensive effort to preserve its landscape and natural beauty. Refusing to acknowledge that Ladue's sign ordinance is content-neutral, respondent compounds the error by also failing to recognize the undisputed evidence of the unique environmental problems caused by the proliferation of signs that conflict with Ladue's special aesthetic ambience.

### **I. LADUE'S SIGN ORDINANCE TARGETS ONLY THOSE SIGNS THAT PROLIFERATE, CAUSE VISUAL BLIGHT, DIMINISH THE NATURAL BEAUTY OF THE LANDSCAPE, AND DETRACT FROM THE CITY'S UNIQUE AESTHETIC AMBIENCE.**

Respondent and her *amici* erroneously assert that Ladue totally bans an entire medium of expression—the display of visual messages through signs.<sup>1</sup> This assertion is erroneous because Ladue does not ban all signs containing political or other messages. Ladue has limited the scope of its ordinance to the environmental and aesthetic problems caused by the placement of signs on the landscape or on structures attached to the land. J.A. 120 (definition of “sign” in New Chapter 35, § 35-1). Thus, Ladue's sign ordinance is a reasonable regulation of the “location” and “manner” of expression through signs displayed in a particular way that harms the landscape and natural beauty of the City.

Respondent's identical window sign could have been mailed to others as a “flyer”; distributed to neighbors or

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<sup>1</sup> Res. Br. 12, 41; U.S. Br. 8, 15; American Advertising Federation et al. (hereinafter “AAF”) Br. 17 n.16; Washington Legal Foundation et al. (hereinafter “WLF”) Br. 21; People for the American Way et al. (hereinafter “PAW”) Br. 2, 17-19; Association of National Advertisers, Inc. (hereinafter “ANA”) Br. 3, 21-23.



passers-by as a "handbill"; posted on her car as a car sign or "bumper sticker"; and attached to a placard that she could have held while standing or sitting on her lawn or that she could have worn as a sandwich sign while she marched or "picketed" through the streets of Ladue. In addition, respondent easily could have displayed a flag<sup>2</sup> containing a peace symbol as well as the identical words that were written on her yard and window signs. She also could have had her message placed on a button, cloth patch, arm band, sash, or tee-shirt that could have been worn as an article of clothing. Each of these modes of expression involves the display of visual messages and is permitted under Ladue's sign ordinance. J.A. 120.<sup>3</sup> It is thus incorrect to suggest that the City bans all signs.<sup>4</sup>

<sup>2</sup> Consistent with its effort to prohibit only those types of signs that proliferate and create visual blight, the City did not include flags in its definition of signs. As the Court observed in *Burson v. Freeman*, — U.S. —, 112 S. Ct. 1846, 1856 (1992), "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." Respondent's objection that Ladue's ordinance is too comprehensive is internally inconsistent with her assertion that the sign ordinance is unconstitutional because it does not prohibit flags. Res. Br. 23-24.

<sup>3</sup> "Sign" is defined, in part, as a "name, word, letter, writing, identification, description, or illustration." J.A. 120 (New Chapter 35, § 35-1). Contrary to the assertions of respondent and her amici, Res. Br. 26, n.21; ANA Br. 9, a plain ribbon of any color is not prohibited under Ladue's sign ordinance. *Id.* See n.2, *supra*.

An additional limitation on Ladue's sign ordinance is that it only applies to signs that are "in view of the general public" from the street or a neighboring property. J.A. 120. Thus, the ordinance does not restrict an individual's right to display all types of signs and messages inside of one's home.

<sup>4</sup> The Court should not permit respondent to avoid the legal effect of her failure in the summary judgment proceedings to contest Ladue's evidence that signs and other ample, alternative modes of speech are available for people to express themselves. Based on traditional summary judgment principles, the Court should decide this issue as a matter of law in Ladue's favor. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-255 (1986).

Indeed, compared to respondent's yard and window signs, many of these alternative signs are as inexpensive and much more effective in conveying respondent's message to large numbers of people. Willow Hill Lane, the street on which respondent lives, is a non-thoroughfare with fifty-seven private, single-family homes. J.A. 182. Respondent's signs had a small audience consisting of her neighbors, visitors, and the limited commercial traffic on the street. An inexpensive picketing sign, sandwich sign, bumper sticker, and car sign, for example, would have reached a much larger audience.<sup>5</sup>

Ignoring the undisputed Record below and the law of summary judgment,<sup>6</sup> respondent and her amici refuse to

<sup>5</sup> The Record is consistent with the District Court's findings in *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984). There, the Court concluded that "nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication \* \* \*." *Id.*

Respondent unsuccessfully attempts to distinguish *Vincent* on the grounds that lampposts and utility poles on which the signs were placed were not a "public forum." Res. Br. 45-46. But the Court observed that "[j]ust as it is not dispositive to label the posting of signs on public property as a discrete medium of expression, it is also of limited utility in the context of this case to focus on whether the tangible property itself should be deemed a public forum." 466 U.S. at 815 n.32. The Court also evaluated Los Angeles' sign ordinance under the time, place, or manner test reserved for speech in a public forum. *Id.* at 804-805. See Pet. Br. at 16.

<sup>6</sup> Rejecting Malcolm C. Drummond's factual observations and expert opinion, respondent and her amici do not accept the uncontested facts in the Record establishing that sign proliferation is a genuine problem that Ladue eliminated with its sign ordinance. Res. Br. 29, 30 n.23; U.S. Br. 15, 21; WLF Br. 9, 14 n.11; ANA Br. 4, 17-20.

Respondent and her amici ignore the law of summary judgment by assuming facts that are not supported by the Record. See e.g., *id.* Because summary judgment was entered against the City, the Court must not only accept the truth of the undisputed Record but also resolve any factual disputes in favor of the City. *Anderson*, 477 U.S. at 255.

Respondent's submission is further undermined by her failure to apply the controlling standard of review of whether the City

accept the undisputed facts and expert opinion of Malcolm C. Drummond, an urban planner with more than forty years of experience including thirty years in the St. Louis area. Drummond witnessed the proliferation of signs in residential communities, near Ladue, which he has served as a planner. J.A. 139, 154-55.

Respondent improperly dismisses as "conjecture," Br. at 30 n.23, Drummond's uncontroverted testimony that Ladue's sign ordinance helped the City to achieve its goal of "aesthetic excellence" and was a reasonable solution to the problem of sign proliferation. J.A. 157-58. Contrary to respondent's suggestion, Drummond's opinion and Ladue's sign regulation is consistent with the Court's holding in *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). There, the Court held that a City "may decide that the esthetic interest in avoiding 'visual clutter' justifies a removal of signs creating or increasing that clutter \* \* \* [I]f permitted to remain, ['Taxpayers for Vincent' signs] would encourage others to post additional signs \* \* \*." 466 U.S. at 817.<sup>7</sup>

made a reasonable judgment in enacting the ordinance to address the problems caused by the proliferation of signs. See *Anderson*, 477 U.S. at 251-255 (factual dispute is immaterial if it is not outcome-determinative under prevailing law). See also *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) ("[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce new evidence of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."); *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989) (courts must defer to a city's "reasonable determination" of the best way of addressing land-use problems).

<sup>7</sup> Res. Br. 30 n.23. Respondent erroneously argues that in reviewing a grant of summary judgment in her favor, this Court should reject Drummond's and Mayor Spink's first-hand observations of sign proliferation and accept, as a matter of law, the testimony of Nancy R. Sachs. *Id.* Sachs is a local resident with no expertise or experience in land-use, zoning, or municipal government, as respondent has conceded. Br. at 9 n.12; J.A. 190-193

The Court should reject the mistaken argument of respondent and her *amici* that Ladue may only prevent the visual blight caused by billboards or large permanent signs. Res. Br. 15, 47; U.S. Br. 12; WLF Br. 16. In *Vincent*, the Court equated the problems created by billboards and a proliferation of small temporary signs. 466 U.S. at 806-807, 817. The Court held that the "visual assault" caused by the "accumulation of signs" is a nuisance and a "significant substantive evil within the City's power to prohibit." *Id.* at 807.<sup>8</sup> A commentator's assessment of the aesthetic and social costs of signs underscores the validity of the Court's holding in *Vincent*. "In many cities, sign clutter dominates the streetscape, overshadowing buildings and trees, eroding cultural and architectural

(Sachs Aff.). During an eighteen-day period in which this litigation was pending before the District Court and in which there was no election or unusual commercial activity in the City, Sachs made an "informal survey" of selected streets in Ladue. *Id.* Based on this survey, she concluded that there was no basis for Ladue's concern about sign proliferation. *Id.*

Sachs' affidavit represented respondent's entire evidentiary case filed in the summary judgment proceedings on Ladue's new sign ordinance. Based on Ladue's evidentiary record, the controlling standard of review, and the law of summary judgment, this Court should disregard Sachs' affidavit because it is immaterial on any issue in this case. See Pet. Br. 20-21. Even if Sachs' affidavit were sufficient to create a triable issue of fact, because summary judgment was entered against the City, the judgment below must be reversed.

<sup>8</sup> The Court's recognition of the seriousness of the environmental problem is reflected by its acknowledgement of the views of seven Justices in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), who "explicitly concluded" that the "city's interest in avoiding visual clutter \* \* \* was sufficient to justify a prohibition of billboards." *Vincent*, 466 U.S. at 806-807. See also Richard Brooks and Peter Lavigne, *Aesthetic Theory and Landscape Protection: The Many Meanings of Beauty and Their Implications for the Design, Control and Protection of Vermont's Landscape*, 4 *Journal of Environmental Law and Policy* 129, 131, 137, 144-145 (1985); William H. Whyte, *The Last Landscape* 300 (1968) ("The first thing is to get rid of billboards. \* \* \* They are a desecration to the landscape and that is reason to be done with them.").

diversity, ruining scenic views and historic ambience and blighting whole neighborhoods." Edward T. McMahon, *Regulating Signs*, Main Street News, No. 70 at 1, 2 (National Trust For Historic Preservation, Aug. 1991). If one considers the problems caused by the proliferation of signs—visual blight, safety hazards, and the deterioration of real estate values—one must conclude that there is no basis for distinguishing between the 15 by 44-inch cardboard political signs at issue in *Vincent*, 466 U.S. at 792, and the 24 by 36-inch yard sign and 8½ by 11-inch window sign that belonged to respondent. Pet. App. 22a, 3a.

Respondent ignores the Court's and the commentators' recognition of the unique evils that signs create. Signs placed in the ground or on an attached structure create unique regulatory problems and cannot be compared to activities involving flyers, handbills, leaflets, door-to-door solicitation, or even the sound trucks that were banned under a constitutional ordinance analyzed in *Kovacs v. Coopers*, 366 U.S. 77 (1949). Because of the great number of signs, people are captive to them and cannot escape the invasion on their privacy.<sup>9</sup> One cannot look at signs and then, like flyers, handbills, and leaflets, discard them out of the view of those who want to enjoy an uncluttered

<sup>9</sup> Respondent mischaracterizes the privacy rationale supporting Ladue's sign ordinance when she mistakenly contends that it is based on the controversial messages contained on some signs. Res. Br. 38. Ladue's sign ordinance applies equally to controversial and noncontroversial signs. J.A. 116-131. Malcolm Drummond, Ladue's land-use planner, accurately summarized the privacy concerns when he testified, "signs and billboards naturally cause visual blight as well as impinge on privacy because those who see them are a 'captive audience.'" J.A. 155.

Respondent also misconstrues the safety rationale underlying Ladue's sign ordinance. Res. Br. 37. The ordinance recognizes that the "proliferation of an unlimited number of signs \* \* \* may cause safety and traffic hazards to motorists, pedestrians, and children \* \* \*." J.A. 117 (emphasis added); see also *id.* at 119. The ordinance permits any sign that identifies a safety hazard because of the City's substantial interest in the public's safety and welfare. J.A. 118-119, 122. If Ladue did not allow such signs, the City's interest in protecting public safety would be harmed.

landscape.<sup>10</sup> While sound trucks may cause a temporary distraction, they do not remain posted; signs present a continuing harm to the beauty of the landscape.

## II. LADUE'S SIGN ORDINANCE MUST BE EVALUATED AS PART OF THE CITY'S COMPREHENSIVE LAND-USE AND ZONING REGULATIONS OF PRIVATE AND PUBLIC PROPERTY.

Respondent and her *amici* ask this Court to adopt a jurisprudential theory that clashes with the fundamental assumptions of zoning, land-use, and municipal planning. They erroneously suggest that in evaluating Ladue's ordinance, the Court should only consider the aesthetic impact of a single yard or window sign.<sup>11</sup> Respondent's suggestion

<sup>10</sup> In his opinion for the Court in *Vincent*, Justice Stevens' analysis of the unique problems created by signs demonstrates the reasonableness of Ladue's solution. "[T]he substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself." 466 U.S. at 810. "By banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy." 466 U.S. at 808.

Justice Stevens distinguished the Court's decisions in *Schneider v. State*, 308 U.S. 147, 162, 164 (1939), and *Martin v. City of Struthers*, 319 U.S. 141, 147-148 (1943), which held invalid ordinances that regulated the distribution of handbills and door-to-door solicitation. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 552 n.23 (Stevens, J., dissenting in part). "In those cases, the state interests the ordinances purported to serve—for instance, the prevention of littering or fraud—were only indirectly furthered by the regulation of communicative activity." *Id.* See also *Vincent*, 466 U.S. at 808-810 (distinguishing *Schneider*).

<sup>11</sup> Res. Br. 36 n.30; U.S. Br. 15; WLF Br. 22. Respondent and her *amici* particularly question Ladue's decision not to permit window signs. *Id.* Land-use experts include wall signs, which can sometimes be in the form of graffiti, and window signs as examples of the use of signs creating aesthetic problems that should be regulated. Daniel R. Mandelker and William R. Ewald, *Street Graphics and the Law* i-vi, 74, 97 (revised ed. 1988) (hereinafter "*Street Graphics*"). Moreover, respondent herself relies on a book that offers potential candidates and campaign workers a step-by-step procedure on the best way of distributing mass quantities of signs, which will especially be used as window signs and will



conflicts with the Court's recognition in *Vincent* of the "visual assault" caused by the "accumulation of signs." 466 U.S. at 807. Moreover, as one scholar observed, "the nuisance cases disclose early judicial recognition of the fact that some uses are incompatible with others and that the rights of all landowners will be diminished unless the rights of all are subject to reasonable restraints. This, of course, is the major premise of comprehensive zoning \* \* \*." Robert M. Anderson, 1 *American Law of Zoning* 3d § 3.03 at 89-90 (1986).<sup>12</sup> See also *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-89 (1926) (upholding the reasonable judgment of the legislature to enact zoning and land-use laws that are necessary to protect the public welfare in a particular community).

In *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989), the Court rejected the argument being made by respondent and her *amici* here. The Court stated that "[t]he validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Id.* The Court's holding in *Ward* has particular importance when one considers the problem of sign proliferation in the context of Ladue's comprehensive land-use plan. J.A. 140, 141, 147, 149, 151, 157-58 (city planner's analysis of the land-use and zoning assumptions of Ladue's sign ordinance and comprehensive city plan). Ladue's sign ordinance is an integral part of its zoning laws that are designed to pre-

proliferate throughout the geographic area in which an election is being held. Res. Br. 18 (quoting Dick Simpson, *Winning Elections: A Handbook in Participatory Politics* 77-79 (1981)).

<sup>12</sup> Respondent implicitly rejects the premise of land use and zoning laws when she argues that Ladue should be legally compelled to assume that all property owners in Ladue will police themselves and not permit signs to proliferate in the City. Res. Br. 29-30. But as two experienced experts have observed, "An individual cannot be his own traffic cop. Within a community, it is not possible for everyone to make and enforce his own rules. When every street graphic erected is a law unto itself, community bad manners result." *Street Graphics*, *supra*, at 34.

serve the community's natural beauty and protect the land values throughout the City. J.A. at 116-119 (text of Ladue's sign ordinance stating that the preservation of the value of real estate in Ladue is a principal purpose of the ordinance). As the Court recognized in *Vincent*, these goals are entirely permissible ones: "[The] interests are both psychological and economic. The character of the environment affects the quality of life and the value of property in both residential and commercial areas." 466 U.S. at 817.

Respondent and her *amici* assume the role of Ladue's land-use planners and suggest that the City could eliminate the problem of visual blight caused by a multiplicity of signs by regulating the size, location, time of placement, and number of signs in a subdivision or on a family's property.<sup>13</sup> In *Ward*, however, the Court rejected the suggestion that cities must enact the "least restrictive \* \* \* alternative" to satisfy the time, place, or manner test. 491 U.S. at 799-800. The Court held that "[t]he validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decision-maker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted." 491 U.S. at 800 (internal quotation marks omitted). See also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (rejecting proposed "less speech-restrictive alternatives" to preserve park lands and stating that "[w]e do not believe \* \* \* the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.").

Even if respondent were permitted to disregard *Ward's* rejection of the least restrictive alternative test, none of

<sup>13</sup> Res. Br. 39-40; U.S. Br. 22; AAF Br. 14; PAW Br. 3; WLF Br. 22; ANA Br. 4, 13.

her proposed alternatives would eliminate the problem of visual blight in a constitutional fashion. An ordinance limiting the size and location of signs does not address the problems created by the proliferation of signs. If Ladue limited the number of signs to one per household, it would still be compelled to permit more than 3,000 signs that would clutter the city's landscape.<sup>14</sup> See *Vincent*, 466 U.S. at 816 (rejecting the argument that similar proposed alternatives are "constitutionally mandated" and observing that if an alternative were enacted "the volume of permissible postings \* \* \* might so limit the ordinance's effect as to defeat its aim of combating visual blight."); cf. *City of Cincinnati v. Discovery Network, Inc.*, — U.S. —, 113 S. Ct. 1505, 1510 (1993) (municipal ordinance limiting number of newsracks was underinclusive and unconstitutional because it had only a "minute" or "paltry" effect on the problem of visual blight). Moreover, as the Fourth Circuit has held, an ordinance that limits the number of signs on an individual lot or within a subdivision could have serious constitutional problems because it would discriminate in favor of the issues selected by the individual member of each household or subdivision who is permitted to erect the allotted signs.<sup>15</sup>

The importance of deferring to Ladue's legislative plan for eliminating the problem of sign proliferation and visual blight is highlighted because experts are valuable in addressing land-use and zoning issues. See *Street Graphics*, *supra*. Since its inception, Ladue has consistently relied on

<sup>14</sup> The 1990 United States census data show that Ladue has 3,384 housing units and a population of 8,847. 1990 Census Data for St. Louis County, *Supplement to St. Louis County, Missouri Fact Book* 10, 13 (1991). These units are houses because Ladue's zoning ordinance does not allow multiple-unit dwellings such as apartments. See J.A. 145, 147; Ladue's Zoning Ordinance, No. 1175 § II A (9).

<sup>15</sup> In *Arlington County Republican Committee v. Arlington County, Virginia*, 983 F.2d 587, 594 (4th Cir. 1993), the court held that a county's limit of two signs per homeowner infringes speech because it prevents each person living in the home to post signs for multiple candidates in multiple political races.

expert advice to address such issues. J.A. 139-141, 157-158. Ladue's sign ordinance is consistent with its original comprehensive city plan prepared by Harland Bartholomew, one of the fathers of urban planning in this country. J.A. 144, 151, 157-158.<sup>16</sup>

Ladue's longstanding and comprehensive commitment to preserving its community's aesthetics should "inform the application of the relevant test" for the regulation of the time, place, or manner of speech. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).<sup>17</sup> See Pet. Br. 3-8; J.A. 145-158. See also *Ward*, 491 U.S. at 791 (the justification and purpose for the governmental regulation is an essential element of the time, place, or manner test);

<sup>16</sup> See Eldridge Lovelace, *Harland Bartholomew[:]* *His Contribution to American Urban Planning* 58 (1992) ("Application of an orderly and logical system or science to the preparation of the comprehensive plan was Harland Bartholomew's first and greatest contribution to city planning."). Bartholomew's work reflected his philosophy that a community can improve its appearance and aesthetics with careful planning. See *id.* at 14. See also *id.* at 154-161 (describing Bartholomew's "scientific approach" in land-use planning as Chairman of the National Capital Planning Commission in 1953 and his instrumental role in the building of the Washington Metro).

<sup>17</sup> As Professor Andre Angsthelm of Grenoble University observed in his study of Parisian sign regulation, "Aesthetics refuse generalization, they are always a case in point." Quoted in *Street Graphics*, *supra*, at 8. Malcolm Drummond testified that each of the many communities he has represented "has its own particular physical features, geography, history, socio-economic mix and comprehensive view of its own planning and land use goals \* \* \*." J.A. 140. Drummond explained that there are "great differences" in each city's "appearance, aesthetic quality and harmony of its environment, and the degree of the regulation it is willing to impose and accept in order to achieve and maintain its land use goals and its aesthetic, environmental quality and other community planning objectives \* \* \*." J.A. 140-141. The fact that other cities may not share Ladue's aesthetic values and thus do not to enact ordinances to eliminate the problems created by the proliferation of signs in their communities should not prevent Ladue from concluding otherwise. J.A. 140-141, 154-155. See *Ward*, 491 U.S. at 501.

*Burson v. Freeman*, — U.S. —, 112 S. Ct. 1846, 1858-1859 (1992) (Kennedy, J., concurring) (same). Ladue has proven its commitment to aesthetics and land-use planning through the City's consistent and successful defense of its land-use and zoning ordinances in the Missouri courts over the past forty years. J.A. 145-146 (collecting cases).

This Court has consistently affirmed the authority of cities to regulate private property to advance aesthetic goals.<sup>18</sup> *Euclid*, 272 U.S. at 387-389 (city's right to abate nuisances for aesthetic reasons constitutes authority for the constitutional validity of zoning laws); *Berman v. Parker*, 348 U.S. 26, 33 (1954) (stating that the concept of the public welfare "is broad and inclusive" and "[t]he values it represents are spiritual"<sup>19</sup> as well as

<sup>18</sup> The strength of Ladue's interests in aesthetics is demonstrated by its ability to satisfy Justice Brennan's test that requires cities to establish in the Record that their sign ordinance was part of a "serious[]" and "comprehensive[]" plan of "addressing aesthetic concerns." *Metromedia*, 453 U.S. at 531 (Brennan, J., concurring, joined by Blackmun, J.). Justices Brennan and Blackmun observed that "[o]f course, it is not for a court to impose its own notion of beauty on San Diego." *Id.* The United States acknowledges Ladue's "substantial" interests and recognizes that "particular communities, because of their unique and special heritage, may have a special interest in regulating for aesthetic purposes." U.S. Br. 9-10 (internal quotation marks omitted).

Respondent argues that Ladue should not be compared to historic Williamsburg, a city that Justice Brennan suggested might satisfy his rigorous test (453 U.S. at 534), because Ladue is not an "outdoor museum." Res. Br. 37 n.31. But Ladue has a stronger claim for the regulation of sign clutter than does Williamsburg. Families who live in the private, residential neighborhoods of Ladue would be affected every day by the evils of visual blight, while the historic district of Williamsburg is reserved for tourism. See *Frisby*, 487 U.S. at 194 (recognizing the unique value of privacy in a small, residential neighborhood).

<sup>19</sup> Contrary to Respondent's suggestion, Br. at 17, the Old Testament does not support the notion that signs should be allowed to defile Nature and the beauty of the landscape. The Bible posits that God created Nature long before human beings began to erect signs and billboards. See, e.g., *Psalms* 19:2 (King James) ("The

physical, aesthetic as well as monetary," quoted in *Vincent*, 466 U.S. at 805). The *Berman* Court held that it was "within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." 348 U.S. at 33. See also *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (city has a legitimate interest in preserving places where "the blessings of quiet seclusion and clean air make the areas a sanctuary for people"); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 129 (1978) ("New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal").<sup>20</sup>

Respondent's argument that she should have the absolute right "to do what she wishes"<sup>21</sup> with her real property conflicts with the Court's holding in *Barnes v. Glen*

heavens declare the glory of God; and the firmament showeth his handiwork.").

Respondent and her amici misstate normative Jewish law concerning the placement of a *Mezuzah* and compound the error by asserting that a *Mezuzah* would be prohibited under Ladue's sign ordinance. Res. Br. 17 n.15; WLF Br. 17. A *Mezuzah* is affixed on the inside of the right doorpost one-third of the distance from the top of the doorpost. *Daat Yisrael VeMinhagav* [Laws and Customs of Israel] 12-13 (Pardes 1952) (Hebrew with English tr.) (compiled from the Codes, *Chayye Adam* and *Kizzur Shulchan Arukh*). One is able to view the *Mezuzah* as one passes through a doorway. A *Mezuzah* is not prohibited under Ladue's ordinance because it is not placed on the "exterior" of the outside wall and is not visible from the street in view of the general public. See J.A. 120-121 (definition of sign).

<sup>20</sup> Ladue's commitment to aesthetics extends to the preservation of its residential architecture as well as its landscape and natural settings. *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305, 310 (Mo. 1970) (upholding enforcement of Ladue's ordinance regulating architecture of residential homes "when the basic purpose to be served is that of the general welfare of persons in the entire community" and the ordinance maintains the "stability of value \* \* \* of surrounding property") (emphasis deleted).

<sup>21</sup> Res. Br. 16. See also AAF Br. 15; WLF Br. 7, 9; PAW Br. 20; ANA Br. 26-27.



*Theatre, Inc.*, — U.S. —, 111 S. Ct. 2456, 2460 (1991), as well as the settled legal doctrine, discussed above, upholding the validity of zoning laws and the government's right to abate nuisances.

Respondent and her *amici*<sup>22</sup> erroneously argue that *Vincent* should be interpreted as prohibiting a city from regulating sign proliferation on private as opposed to public property. The Court in *Vincent*, however, rejected this argument noting that "the esthetic interests that are implicated by temporary signs are presumptively at work in all parts of the city \* \* \* and affect[] the quality of life and value of property in both residential and commercial areas." 466 U.S. at 817. To be sure, *Vincent* noted that a "private citizen's interest in controlling the use of his own property justifies the disparate treatment [between private and public property]." *Id.* at 811. But the statement merely reflects the Court's deference to each city's land-use and zoning laws. *Id.* The context of this statement was the Court's rejection of the argument that Los Angeles' sign ordinance was unconstitutional because it chose not to extend its ban on temporary signs to private property. *Id.* at 811.<sup>23</sup> The Court, however,

<sup>22</sup> Res. Br. 16, 45-46; AAF Br. 15; WLF Br. 9; PAW Br. 20, 23.

<sup>23</sup> In *Vincent*, the American Civil Liberties Union [hereinafter "ACLU"], which represents respondent here, argued that Los Angeles' sign ordinance was unconstitutional because it did not extend its regulation of signs to private property. "[T]he City's willingness to permit posting of private property demonstrates the City has determined that traffic safety and aesthetics are not transcendent objectives." Brief for the ACLU at 29, *Vincent* (No. 82-975) (internal quotation marks omitted). Ladue, however, has prohibited all signs posted on private property except those required by public safety and the Constitution. Surely this demonstrates that the City's objectives are "transcendent."

In *Vincent*, the ACLU also argued that Los Angeles' failure to regulate signs on private property "discriminates against the views of those who do not control private property. \* \* \* It is the poor who are unlikely to have the means for private property on which they may post signs." *Id.* at 38-39. The ACLU in this case argues the reverse: that Ladue is discriminating against the poor

did not hold that a city is *required*, as a matter of federal constitutional law, to treat private property in residential neighborhoods differently than public property.

### III. LADUE DOES NOT DISCRIMINATE AGAINST THE CONTENT OF SPEECH BY ALLOWING ON-SITE SIGNS AND BY RECOGNIZING THE SIGNIFICANT LAND-USE DIFFERENCES BETWEEN PRIVATE SINGLE-FAMILY RESIDENCES AND STORES, OFFICES, RELIGIOUS INSTITUTIONS, AND SCHOOLS THAT SERVE THE PUBLIC.

Respondent and her *amici* improperly characterize Ladue's limited on-site exceptions to its ordinance as content-based.<sup>24</sup> They ignore the neutral governmental interests and the land-use rationale for each of the exceptions. The signs that are permitted may be constitutionally required because of the unique relationship between the location and function of the signs. Pet. Br. 27-30.<sup>25</sup> There are no "ample alternative channels for communication" for the messages of these signs, which are naturally

by regulating signs on private property. Res. Br. 45. See also U.S. Br. 12-13; PAW Br. 23, 26. Ladue's efforts to prevent property owners from cluttering the landscape cannot be viewed as discriminating against the poor.

<sup>24</sup> Res. Br. 21-25; U.S. Br. 25-26; AAF Br. 3-4, 10; WLF Br. 6, 13; PAW Br. 14; ANA Br. 25-27. All of these *amici*, however, do not address the serious concerns raised by Chief Justice (then-Justice) Rehnquist, Justice Stevens, and then-Chief Justice Burger in their dissenting opinions in *Metromedia*. 453 U.S. at 555-569 (Burger, C.J., dissenting); *id.* at 540-555 (Stevens, J., dissenting in part); *id.* at 570-571 (Rehnquist, J., dissenting). These Justices criticized the plurality's "all or nothing" approach that, as a practical matter, prevents cities like Ladue from enacting ordinances to eliminate the problem of visual blight that plagues their communities. *Id.* See Pet. Br. 31-33; 24-30.

<sup>25</sup> See *City of Cincinnati v. Discovery Network, Inc.*, — U.S. —, 113 S. Ct. 1505, 1514 n.20 (1993) (discussing rationale of onsite/offsite distinction). See also Brief of Amici Hawaii et al. at 31-32 & n.13 (citing lower courts cases that have "upheld onsite/offsite sign distinctions as content-neutral restrictions based on an appropriate regulation of the 'place' or location of speech").

limited in number. *See, e.g., Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977).

Ladue's ordinance thus merely reflects the significant land-use differences and considerations that underlie the separate regulation of property used for single-family homes and property used for offices, stores, religious institutions, schools, and other buildings frequented by the public. *See* Brief of *Amici* National Institute of Municipal Law Officers et al. at 15-23; Brief of *Amici* Hawaii et al. at 31-44. On-site identification signs are a necessity throughout the City.<sup>26</sup> As a matter of public necessity and convenience, however, on-site signs for the limited number of Ladue's offices, stores, religious institutions, schools, and other buildings that serve the public—local residents, visitors, and passers-by—are also needed to inform the public about the activities conducted on the premises.<sup>27</sup> *See Street Graphics, supra*, at 1 ("The primary function of on-premise street graphics is to *index* the environment—that is, to tell people where

<sup>26</sup> Respondent misinterprets the exceptions in Ladue's sign ordinance that permit residence and driveway "identification" signs. J.A. 121-122, New Chapter 35, § 35-4. Respondent erroneously argues that these signs permit advertising of one's occupation. Res. Br. 21 & n.16, 25. Ladue construes these "identification" signs to include only a street address and the name of the occupants of the home. Thus, a resident could identify her home and driveway by erecting signs that stated "Number 44—Ladue Road" and "The Smith's Residence." Ladue's zoning ordinance incorporates Ladue's sign ordinance and, therefore, follows the same governing rules on the regulation of signs. Ordinance No. 1175, § IV (B); *see* J.A. 145. Under Ladue's zoning ordinance, the definition of "home occupation" precludes any sign or exterior indication of such an accessory use. Ordinance No. 1175 at § XII.

<sup>27</sup> The United States, Br. at 27-28, improperly attempts to find evidence of discrimination by ignoring Ladue's limiting construction of the exception in its ordinance for "[c]ommercial signs in commercially zoned or industrially zoned districts \* \* \*." J.A. 122. Ladue interprets this exception to apply only to signs in commercial or industrial zoned areas that "identify the premises or are directly related to activities conducted on the premises." Pet. Br. 27-28.

they can find what.") (emphasis in original).<sup>28</sup> *See also* U.S. Br. 26-27 n.27 (explaining neutral justification for permitting on-site signs); AAF Br. 18 ("Commercial activity is basically impossible if a seller is unable to advertise on-site, at a minimum, its presence and what is offered on the premises.").

As the Court of Appeals held, Ladue's ordinance does not discriminate based on the viewpoint reflected by the message on any sign. Pet. App. 4a n.5. Ladue's ordinance, on its face, does not favor the content of any message. Commercial, noncommercial, political, nonpolitical, controversial or noncontroversial signs are all prohibited under Ladue's ordinance. The ordinance's limited exceptions are only for those signs that are naturally limited in number and for which there are no ample alternative modes of communication. By permitting signs for which there are no adequate alternatives, the City has merely attempted to satisfy this Court's holding in *Linmark*, 431 U.S. at 93. Surely if the governmental purpose is the controlling consideration in assessing content neutrality, Ladue's attempt to comply with this Court's precedents cannot render its ordinance content-based. Likewise, because Ladue's ordinance ensures that no one has any advantage over the political and social debate in the City, it is content-neutral. *See Heffron v.*

<sup>28</sup> Respondent and her *amici* misunderstand fundamental land-use principles when they argue that Ladue's ordinance is content-based because it does not allow signs in residential neighborhoods that identify the activity occurring on the premises. Res. Br. 21-22; U.S. Br. 26; AAF Br. 6; PAW Br. 14; ANA Br. 24. These signs are not allowed because they proliferate and there are many alternative ways for occupants of homes to communicate with the limited audience that has an interest in the activities being conducted at the home. For example, if one is hosting a party or a political fundraiser at one's home, the most convenient and effective way of communicating the event is through telephone calls or invitations sent through the mail to intended guests, not through signs on the property.

*International Society for Krishna Consciousness*, 452 U.S. 640, 654-655 (1981).<sup>29</sup>

Respondent and her *amicus* ANA misrepresent the Record when they argue that Ladue has enforced its ordinance in a discriminatory fashion. Res. Br. 26 n.21; ANA Br. 5, 8 & n.4, 11-12. Ladue's sign ordinance does not give City officials any discretion to permit signs based on the viewpoint or content of an individual sign. J.A. 116-131. Moreover, there is not a scintilla of evidence in the Record that Ladue has enforced its sign ordinance in a discriminatory fashion.<sup>30</sup> Neither the District Court

<sup>29</sup> Respondent has abandoned, without explanation, the District Court's holding that Ladue discriminated against noncommercial speech by allowing "signs like traffic signs, street signs or house numbers." Br. at 25. Cf. Pet. App. 28a (District Court's opinion holding identical exceptions are unconstitutional); Pet. App. 4a, 8a (Court of Appeals' opinion).

<sup>30</sup> Respondent's assertion of discrimination is based on testimony concerning Ladue's predecessor sign ordinance that has been repealed and is not at issue before this Court. J.A. 26-37, Old Chapter 35 (repealed January 21, 1991). See Res. Br. 4-5 & nn.2-4; 26 & n.21; 32-33 & n.25. As petitioners previously explained, Pet. Br. 21-23, respondent's discussion of the Record on Old Chapter 35 is factually and legally irrelevant.

Assuming, *arguendo*, that Ladue's predecessor sign ordinances had any legal relevance, respondent misrepresents the Record and ignores the standard for reviewing a grant of summary judgment. Ladue's Chief of Police, Calvin Dierberg, testified unequivocally that in his thirty-five years of service he has "never known" the Ladue Police to discriminate in any way in the enforcement of Ladue's sign ordinance. J.A. 104-106. Chief Dierberg's testimony was supported by a computer print-out of sign ordinance violations between 1988-1990. *Id.* at 106. There is not a single instance in the Record indicating that the Police had notice of a violation and failed to enforce the sign ordinance. Respondent's claim of discrimination based on the existence of a few yard cards and other signs is the equivalent of arguing that if someone drives in excess of the speed limit and is not immediately stopped by the Police (who have no notice of the violation), then the Police could be accused of discriminatory enforcement of the City's speeding ordinance.

Respondent also improperly characterizes and takes out of context the irrelevant testimony of Mayor Spink and Councilman Remington on the meaning of ambiguous provisions of Old Chap-

nor the Court of Appeals made any finding that Ladue has ever applied its current or predecessor sign ordinances in a discriminatory fashion.

The Court should not allow respondent's and her *amici's* consistent refusal to accept the undisputed facts in the Record to obscure the practical effect of their legal position. If the judgment of the lower courts is affirmed, small, carefully planned, and beautifully landscaped residential communities like Ladue will be left powerless to protect their residents from the evils caused by the proliferation of signs.<sup>31</sup> The Court should not countenance

ter 35. See Pet. Br. 21-22. See also J.A. 82-83, 85, 86 (Remington); J.A. 90, 91, 93, 95 (Spink).

<sup>31</sup> Respondent implies and the United States concedes that the Highway Beautification Act of 1965 [hereinafter "HBA"], Pub. L. No. 89-285, § 101, 79 Stat. 1028 (codified as 23 U.S.C. § 131), is a reasonable regulation of the time, place, or manner of speech. Res. Br. 47, U.S. Br. 23. They, however, take the inconsistent position of attacking Ladue's sign ordinance, which has a much stronger claim of constitutional validity. Res. Br. 46-48; U.S. Br. 23-28. See Pet. Br. 48-50.

Respondent and the United States misstate and fail to disclose to the Court important provisions of the HBA and its accompanying regulations. Res. Br. 46-48; U.S. Br. 23-28. See also Res. Br. in Opp'n. to Pet. for Cert. at 13 (erroneously asserting that the HBA "is limited to industrial and commercial property"). The HBA applies to "signs, displays, and devices," which include billboards as well as small, temporary outdoor yard, window, and wall signs on public and private property. 23 U.S.C. § 131 (a)-(c); 23 C.F.R. § 750.102 (m) ("[s]ign" is defined to "mean[] any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or any other thing which is designed, intended, or used to advertise or inform, any part of the advertising or informative contents of which is visible from any place on the main-traveled way of a controlled portion of the Interstate System").

The United States has previously represented to this Court that the HBA "does not exempt temporary signs or those proclaiming a political message." Brief for the United States at 26 n.26, *Metromedia* (No. 80-195). The United States has now abandoned its earlier position by suggesting that the HBA's exemption for on-site signs, 23 U.S.C. § 131 (c) (3), includes political and other noncommercial "advertising" signs. U.S. Br. 26. The messages contained on respondent's yard and window signs,



this unfair result that is at odds with its jurisprudence permitting reasonable regulations of the time, place, or manner of speech.

### CONCLUSION

For the foregoing reasons, as well as those stated in our opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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however, would not be permitted under the government's new definition of an on-site sign under the HBA. *Id.*

The United States does not disclose that the regulations promulgated by the Federal Highway Administration of the Department of Transportation define the "directional and official signs" exempted under the HBA, 23 U.S.C. § 131 (c) (1), to include "service club and religious notices" and "public service signs" but not political signs. 23 C.F.R. § 750.153 (m).

Ladue has justified each of the limited exceptions contained in its sign ordinance. The United States, however, does not explain the content neutral reasons for all of the exceptions permitted by the HBA and its accompanying regulations. U.S. Br. 8 n.9 & 25-27. Nor does the government suggest how its aesthetic interest in the "7.8% of all roads and streets in the United States," which are subject to the HBA and which "cover 50.6% of all the vehicle miles traveled" in this country, can compare to the beautifully landscaped and carefully preserved 8.5 square miles constituting the City of Ladue. U.S. Br. 24 n.25. The United States also is unable to explain why property owners in Ladue should have the absolute right to erect signs that would be seen by only a handful of people, while the owners of thousands of miles of property bordering the highways that are subject to the HBA do not have the same right to erect signs that would be visible to millions of motorists. *Id.*

①

No. 92-1856

Supreme Court, U.S.  
**FILED**  
DEC 14 1993  
OFFICE OF THE CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1993

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CITY OF LADUE, ET AL., PETITIONERS

v.

MARGARET P. GILLES

---

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
SUPPORTING RESPONDENT**

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### **QUESTION PRESENTED**

Does a municipal ordinance that bans all residential signs carrying political messages on private property within the municipality violate the First Amendment to the Constitution?



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## In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1856

CITY OF LADUE, ET AL., PETITIONERS

v.

MARGARET P. GILLES

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

### BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

#### INTEREST OF THE UNITED STATES

This case presents the question whether a municipal ordinance prohibiting the residential use of political signs violates the First Amendment. In light of its commitment to preserving natural beauty and promoting highway safety, as reflected in the Highway Beautification Act of 1965 (HBA), 23 U.S.C. 131, the United States has a substantial interest in the resolution of issues concerning the constitutional limits on sign regulation. The HBA encourages the States to enforce effective controls of signs along certain major highways, while permitting limited categories of exceptions for practical and constitutional reasons. Although the ordinance at issue



here differs in significant respects from the federal HBA, the analysis that the Court uses in the present case may have significant ramifications for this important federal program. The United States also has a substantial interest in the preservation of constitutional rights of free expression.

### STATEMENT

1. Petitioner, the City of Ladue, Missouri (the City), is a small, largely residential suburb of St. Louis. The City has for many years regulated the use of outdoor signs by means of a municipal ordinance restricting such signs. The present case arose in December, 1990, when respondent, Margaret Gilleo, displayed a sign on the lawn of her home expressing her opposition to United States military involvement in the Persian Gulf.<sup>1</sup> Following the disappearance of her sign, respondent reported the matter to City officials, who informed her that the display of such a sign violated a city ordinance. Pet. App. 22a-23a. Respondent petitioned the Ladue City Council for a variance (permitted by the ordinance at that time), which the Council denied. *Id.* at 24a. Respondent thereupon filed this action, and sought a preliminary injunction against enforcement of the ordinance. *Id.* at 25a.

The district court granted the preliminary injunction, ruling that the ordinance deprived respondent of her constitutional right to free speech. Pet. App. 22a-31a. The court noted that the ordinance established a general prohibition on signs, while enumerating a variety of exceptions. *Id.* at 25a. Applying this Court's ruling in

<sup>1</sup> Respondent's initial sign was 24 by 36 inches in size, and stated: "Say No to War in the Persian Gulf, Call Congress Now." Pet. App. 22a.

*Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the court ruled that Ladue's ordinance "[n]ecessarily included \* \* \* a ban on all noncommercial speech and, specifically, on political or issue-related signs such as [respondent] seeks to erect in her yard." Pet. App. 28a. The court found that the exemptions provided by the ordinance created impermissible content-based distinctions that favored "certain forms of commercial speech" over "political speech." *Id.* at 29a.

Shortly thereafter, while the action was still pending before the district court, the Ladue City Council repealed the then-existing sign ordinance and enacted a new one, on which the subsequent proceedings were based. See Pet. App. 11a-12a. The new ordinance begins with an extensive "Declaration of Findings, Policies, Interests, and Purposes." (Such a statement had not been contained in the predecessor ordinance.) *Id.* at 35a-38a. Like the predecessor ordinance, the new enactment generally prohibits signs except as specifically authorized. See *id.* at 40a. The ordinance contains a number of exceptions, including exceptions for "[m]unicipal" signs, "[s]ubdivision and residence identification" signs, "[r]oad signs and driveway signs for danger, direction, or identification," "[h]ealth inspection" signs, signs "for churches, religious institutions, and schools," signs "identifying the location of public transportation stops," signs "advertising the sale or rental of real property," "[c]ommercial signs in commercially zoned or industrial[ly] zoned districts," signs "identifying safety hazards," and "gasoline filling station" signs. Ordinance §§ 35-4, 35-6 (Pet. App. 40a-41a, 42a). The ordinance omitted a variance provision, see Pet. Br. 22, but provided that "all existing signs that have previously been allowed by ordinance or approved by permit shall be permitted," Ordinance § 35-23 (Pet. App. 49a).

Respondent amended her complaint to include a challenge to the new ordinance, which City officials had interpreted as applying to a new 8-1/2 by 11 inch sign carrying the message "For Peace in the Gulf" that she had posted inside a second floor window of her home after adoption of the new ordinance. See Pet. App. 11a; *id.* at 3a.<sup>2</sup> The district court granted summary judgment for respondent, ruling that her challenge to the predecessor ordinance was moot, but entering a permanent injunction against the new ordinance. *Id.* at 11a-18a. The court again focused on the "explicit content-based exceptions" created by the ordinance, and referred to the analysis in its earlier ruling granting the preliminary injunction. See *id.* at 16a-17a.

2. The court of appeals affirmed. Pet. App. 1a-8a. Relying on the plurality opinion in *Metromedia, supra*, the court concluded that Ladue's ordinance raised "the same concerns" that led the *Metromedia* plurality to strike

<sup>2</sup> The new ordinance defines "Sign" very broadly so as to include "window signs" as small as respondent's:

A name, word, letter, writing, identification, description, or illustration which is erected, placed upon, affixed to, painted or represented upon a building or structure, or any part thereof, or in any manner upon a parcel of land or lot, and which publicizes an object, product, place, activity, opinion, person, institution, organization or place of business, or which is used to advertise or promote the interests of any person. The word "sign" shall also include "banners", "pennants", "insignia", "bulletin boards", "ground signs", "billboards", "poster billboards", "illuminated signs", "projecting signs", "temporary signs", "marquees", "roof signs", "yard signs", "electric signs", "wall signs", and "window signs", wherever placed out of doors in view of the general public or wherever placed indoors as a window sign.

Ordinance § 35-1 (Pet. App. 39a).

down the San Diego ordinance at issue there as a content-based regulation. Pet. App. 3a-4a. The court observed that Ladue's ordinance "favors commercial speech over noncommercial speech,"<sup>3</sup> and it favors certain types of noncommercial speech over others." *Id.* at 4a.

The court of appeals rejected the City's argument that the ordinance is valid under the "secondary effects" doctrine of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Even assuming, *arguendo*, that the "secondary effects" doctrine "extends to cases involving the prohibition of political signs on private property," the court held that the argument failed because "Ladue has not shown that the prohibited signs cause more aesthetic, safety, and property value problems than the permitted signs." Pet. App. 5a.

Having determined that Ladue's ordinance drew distinctions based on the content of the messages displayed, the court of appeals applied "strict scrutiny," under which "content-based restrictions must be necessary to serve a compelling interest and must be narrowly drawn to achieve that end." Pet. App. 6a-7a. The court held that, while Ladue's interests were "substantial," they were "not sufficiently 'compelling' to support a content-based restriction." *Id.* at 7a. Nor was Ladue's ordinance "the least restrictive alternative." *Ibid.*

3. The Highway Beautification Act of 1965 (HBA), Pub. L. No. 89-285, § 101, 79 Stat. 1028, encourages States to control the use of signs along certain major highways, in order to preserve the scenic beauty of those

<sup>3</sup> In a footnote at this point, the court observed: "For example, the ordinance permits commercial signs in districts zoned for commercial or industrial use, but it prohibits most noncommercial signs in those districts." Pet. App. 4a n.4

roads and promote highway safety. 23 U.S.C. 131. Although this federal statute and the state laws enacted pursuant to it are not directly at issue in this case, they raise somewhat similar issues, and have been the subject of First Amendment challenges. See, e.g., *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987), cert. denied, 484 U.S. 1007 (1988); *Rappa v. New Castle County*, 813 F. Supp. 1974 (D. Del. 1992), appeal pending, No. 92-7293 (3d Cir.).

The explicit purpose of the HBA is to "to protect the public investment in \* \* \* highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. 131(a). The HBA's key provision is a requirement that all States provide—on penalty of a ten percent reduction of federal highway funds—for the "effective control of the erection and maintenance \* \* \* of outdoor advertising signs, displays, and devices" in designated areas. 23 U.S.C. 131(b). A State must regulate such signs within specified distances<sup>4</sup> of Interstate or "primary system"<sup>5</sup> highways. *Ibid.* As a general matter, the HBA addresses only signs that are both visible from, and within 660 feet of, such

<sup>4</sup> As originally enacted, the HBA applied to signs within 660 feet of such highways. In 1975, the HBA was amended, see Federal-Aid Highway Amendments of 1974, Pub. L. No. 93-643, § 109(a), 88 Stat. 2284, to include signs "located outside urban areas" that were beyond the 660-foot limit, but only when such signs are both visible to motorists on the highways and "erected with the purpose of their message being read from [the] main traveled way." 23 U.S.C. 131(b); 23 C.F.R. 750.704(a).

<sup>5</sup> The "primary system" (which now exists only for purposes of the HBA) consists of a number of major state highways, which are financed in part by federal highway funds. See 23 U.S.C. 131(t) (Supp. IV 1992).

highways. *Ibid.*; 23 C.F.R. 750.703(i) and (n).<sup>6</sup> Thus, the HBA does not require the States to regulate very small signs or other signs that are not visible from the roadways regulated under the HBA. Respondent's sign, for example, would not be covered by the HBA.<sup>7</sup>

The HBA permits the States to decide whether to impose any regulations at all, and if so to what extent, in areas "zoned industrial or commercial under authority of State law." 23 U.S.C. 131(d).<sup>8</sup> In other areas, the HBA requires States to limit signs to (1) "directional and official" signs; (2) signs "advertising the sale or lease of property upon which they are located"; (3) signs "advertising activities conducted on the property on which they are located"; (4) landmark signs, "including signs on farm structures or natural surfaces, or [signs of] historic or artistic significance the preservation of which would be consistent with the purposes of [Section 131]"; and (5) signs "advertising the distribution by non-

<sup>6</sup> As indicated in note 4, *supra*, States are required to regulate signs further than 660 feet from highways only when they are erected with the purpose of being visible from the highway.

<sup>7</sup> See 23 C.F.R. 750.703(n) (defining the term "visible" to mean "capable of being seen, whether or not readable, without visual aid by a person of normal acuity").

<sup>8</sup> Section 131(d) provides that the Secretary, and each State, enter into an agreement establishing size, lighting and spacing standards for industrial and commercial zones. These agreements also establish definitions as to what constitutes a zoned industrial and commercial area in each State. The HBA does not impose any restrictions as to the content or nature of any sign meeting the agreements' standards. See 23 U.S.C. 131(d).



profit organizations of free coffee." 23 U.S.C. 131(c).<sup>9</sup> The HBA also permits States to allow "information centers," 23 U.S.C. 131(i), and government sponsored signs on public rights-of-way "giving specific information in the interest of the traveling public," 23 U.S.C. 131(f).

### SUMMARY OF ARGUMENT

The federal Highway Beautification Act of 1965 (HBA) regulates the use of signs along major roads in the United States for aesthetic and safety purposes. The HBA is carefully tailored to limit its regulatory reach to accomplish this purpose. It does not impose a total prohibition on the residential display, within an entire community, of ideological and issue-related signs. The HBA also contains a broad and nondiscriminatory "on-site" exception that is both constitutionally permissible and an important safeguard against overly restrictive free expression legislation.

By contrast, the City of Ladue has enacted a municipal ordinance that completely prohibits residents from displaying signs on any political or social topics in, on, or about their homes. The residential display of such signs, however, is a method of communication and personal self-expression that has unique advantages for private

<sup>9</sup> Several of the HBA's exceptions are related to the strong governmental interests in accommodating signs that facilitate and insure the safety of travel along the nation's roadways. Sign regulations that permit direction and location signs, traffic control signs ("stop signs," traffic lights, etc.), and other signs enhancing travel safety (*e.g.*, those identifying roadstops and the availability of coffee), but that do not allow some other signs, do not raise significant constitutional problems. Such signs are essential to the orderly flow of traffic and, by properly directing travelers to their destinations, facilitate the efficient use of increasingly overburdened roadways.

individuals of modest or limited means. A total prohibition of such a form of communication within an entire political community must therefore pass a stringent constitutional test that, at the very least, requires a conclusion that the City's purposes could not have been served substantially as well by less prohibitory regulations.

Ladue's expressed aim is to curb the "proliferation of an unlimited number of signs" that is a threat to aesthetics, safety and privacy. Pet. App. 36a. Although these are legitimate and substantial governmental purposes, such a total prohibition on all residential issue-related signs is, in this case, a plainly overbroad mechanism for vindicating that concern. Ladue's ordinance already contains careful limitations on the number, size and placement of signs that the ordinance permits. Ladue has presented no evidence to indicate, nor does it seem likely, that an unlimited proliferation would occur if similar non-prohibitory regulations were imposed upon residential signs like the one involved in this case.

### ARGUMENT

#### I. THE CITY OF LADUE HAS A SUBSTANTIAL INTEREST IN REGULATING SIGNS FOR AESTHETIC AND SAFETY REASONS

At the outset of this case, it is important to recognize that the City of Ladue's interest in regulation of visual blight—for aesthetic and safety reasons—constitutes a substantial governmental objective. A city's aesthetic "interests are both psychological and economic. The character of the environment affects the quality of life and the value of property in both residential and commercial areas." *Members of City Council v. Taxpayers*

for *Vincent*, 466 U.S. 789, 817 (1984); see *id.* at 807 ("We reaffirm the conclusion of the majority in [*Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981)] \* \* \* [that] the visual assault \* \* \* presented by an accumulation of signs posted on public property \* \* \* constitutes a significant substantive evil within the City's power to prohibit."). Additionally, since outdoor signs along public highways are intended to attract the attention of motorists, such signs may pose a risk to traffic safety. See *Metromedia*, 453 U.S. at 509 (declining "to disagree with the accumulated, commonsense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety").

These twin concerns of highway safety and the preservation of natural beauty have motivated federal efforts to regulate outdoor signs, and are similarly implicated by local ordinances such as the one at issue in this case. See 23 U.S.C. 131(a); cf. Pet. App. 35a-38a. Moreover, particular communities, natural reserves and historical sites, because of their "unique and special heritage," may have a special interest in regulating for aesthetic purposes.<sup>10</sup> Cf. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 129 (1978). The City of Ladue in fact alleges such enhanced interests in support of its sign ordinance. Pet. 4; Pet. Br. 46-47; see also *id.* at 3-5 (describing the City's "Unique Aesthetic Ambience").

<sup>10</sup> In *Metromedia*, Justice Brennan stated that he had "little doubt that some jurisdictions will easily carry the burden of proving the substantiality of their interest in aesthetics." 453 U.S. at 533-534 (concurring in the judgment). Areas lacking historical qualities, however, "should not be prevented from taking steps to correct, as best they may, mistakes of their predecessors." *Id.* at 570 (Rehnquist, J., dissenting).

Somewhat similarly, Congress encourages States to protect the ambience of areas of pristine beauty along primary highways that qualify as "scenic byways." See 23 U.S.C. 131(s) (Supp. IV 1992); Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1046(c), 105 Stat. 1996; see also *id.* § 1047, 105 Stat. 1996-1999 (codified at 23 U.S.C. 101 note (Supp. IV 1992)).<sup>11</sup>

## II. THE DISPLAY BY RESIDENTS ON THEIR OWN PROPERTY OF SMALL SIGNS ON TOPICS OF PUBLIC INTEREST IS AN IMPORTANT FORM OF FIRST AMENDMENT-EXPRESSION

The First Amendment's protection of expression applies to a wide variety of methods of communication, ranging in extent from private personal conversations to international broadcasts via the mass media. In applying the Amendment to these different media, each must be considered in light of its special communicative characteristics. *Metromedia*, 453 U.S. at 501 ("law must reflect the 'differing natures, values, abuses and dangers' of each method") (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)); see also *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression \* \* \* must be assessed

<sup>11</sup> The City, drawing on *Frisby v. Schultz*, 487 U.S. 474 (1988), also seeks to justify its ordinance based on the privacy rights of its citizens. See Pet. Br. 43-44. *Frisby*, however, only recognized a significant governmental interest in protecting the sanctity of the home from speech (picketing) targeting "unwilling listeners \* \* \* when within their own homes." 487 U.S. at 485. Because the placement by a homeowner of a small sign in a window or on a lawn does not similarly invade the sanctity of a neighbor's home, *Frisby* would not seem to apply to such activity. Cf. *Kovacs v. Cooper*, 336 U.S. 77 (1949).

for First Amendment purposes by standards suited to it, for each may present its own problems.”); *FCC v. Pacific Foundation*, 438 U.S. 726, 748 (1978); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

The placement by residents of small signs on their own property, visible to neighbors and passersby, as a means of expressing personal positions on public issues must, we think, be recognized as being among the means of political self-expression subject to First Amendment analysis. See, e.g., *Metromedia*, 453 U.S. at 501 (quoting *Metromedia, Inc. v. City of San Diego*, 610 P.2d 407, 430-431 (Cal. 1980) (Clark, J., dissenting), rev’d, 453 U.S. 490 (1981)) (“The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or ‘broadside’ to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes.”); see also *Taxpayers for Vincent*, 466 U.S. at 811 (recognizing that such homeowner signs constitute “a significant opportunity to communicate” that need not be regulated in the same way as signs on public property).<sup>12</sup>

Small individual residential signs expressing personal viewpoints and other messages in urban areas are substantially different in character from the billboards that were the subject of this Court’s decision in *Metromedia*, and that are also the primary focus of the state regulations encouraged by the HBA.<sup>13</sup> Such billboards are

<sup>12</sup> The fact that the regulation in *Taxpayers for Vincent* did not apply to “homeowner signs” distinguishes that limited ban from the instant case.

<sup>13</sup> All signs meeting the definitional criteria explained *infra* are potentially subject to the Act. Billboards, however, are the primary target of the HBA and account for its enactment.

primarily utilized by relatively well-funded enterprises. Business concerns, candidates, political parties and other groups with sufficient funds to rent billboard space, or to erect their own displays, use billboards to communicate their advertising messages to great numbers of potential customers and voters. For these advertisers, billboard use is ordinarily one of a number of means of available communication; other available means may frequently include television and radio advertisements, the purchase of newspaper and magazine advertising space, unsolicited mailings, telephone “trees” and campaigns.

Signs like the one at issue in this case, on the other hand, are often the only way in which an individual—unless he or she is wealthy—can make a public statement. This Court has, on several occasions, recognized the importance of that fact in the analysis of First Amendment cases. See, e.g., *Taxpayers for Vincent*, 466 U.S. at 812 n.30 (acknowledging “special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be important to a large segment of the citizenry”); *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (“Door to door distribution of circulars is essential to the poorly financed causes of little people.”); *Schneider v. State*, 308 U.S. 147, 164 (1939) (“pamphlets have proved most effective instruments in the dissemination of opinion”). The display of residential signs as a means of expression resembles in function the display by individuals on their person of campaign buttons, issue-related armbands and ribbons, and insignia of various causes or organizations. Both kinds of statements are an important way—and often the best way—for individuals to make public (1) their personal affiliation with, or commitment to, political parties and candidates; (2) their positions on national or local issues; and



(3) the moral precepts, movements and charitable causes they support. No other means through which ordinary citizens may express such ideas to their neighbors is as readily available, personal, inexpensive and unintrusive upon others.<sup>14</sup>

An obvious advantage of placing political and similar signs on one's own property is that individuals can affirmatively link themselves to the signs' messages. Cf. *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 95-96 (1977).<sup>15</sup> Such a link significantly enhances the impact of the message, and it does so in a way that often cannot reasonably be replaced by the use of other media. Moreover, as to some local issues, neighbors provide the most appropriate (and possibly the only relevant) audience for the message.

<sup>14</sup> Other potential methods of communicating personal positions on issues to one's neighbors often come with serious shortcomings. Advertisements in local newspapers (if such exist) are likely to be at least moderately expensive. Unsolicited mailings are somewhat intrusive, quite time-consuming for a private individual, and even more expensive. Unsolicited telephone calls can be especially intrusive. Leafletting is time-consuming for a private individual, contributes to litter, and may also be costly. Fixed or moving street or sidewalk displays and residential loudspeakers have similar drawbacks. See generally *Arlington County Republican Comm. v. Arlington County*, 983 F.2d 587, 594-595 (4th Cir. 1993). Moreover, as *Schneider* and *Martin* illustrate, the availability of one medium of expression does not justify a ban of another.

<sup>15</sup> The messages on certain signs, when placed in particular locations, have unique value for which alternative channels do not exist even if such signs are permitted in other areas of a community. Thus, in *Linmark* this Court invalidated an ordinance prohibiting "For Sale" signs on residential property, in part because of the unique link between the "For Sale" message and the property sold.

We think that there is no dispute, therefore, that residents and homeowners who display small neighborhood signs on their own property are entitled to seek the protection of the First Amendment.<sup>16</sup> We now turn to an analysis of how such protection should be balanced against a community's acknowledged substantial interests in traffic safety and aesthetics.

### III. LADUE'S ORDINANCE IS UNCONSTITUTIONALLY OVERBROAD

#### A. Ladue's Ordinance Imposes A Total Ban On A Form Of Protected Expression

There is no dispute in this case that Ladue's ordinance imposes a total ban on the residential display of signs containing political, social or religious statements or messages. Indeed, Ladue's ordinance bans all residential messages whatsoever, except for "residence identification signs" and "signs advertising the sale or rental of real property." Ordinance §§ 35-2, 35-4(b) and (h) (Pet. App. 40a-41a). What constitutes a prohibited "sign" is also defined with spectacular breadth in Ladue's ordinance. For example, although it is difficult to imagine how respondent's small, 8-1/2 by 11 inch, political-issue placard could, when placed in a window on the second floor of her home, see J.A. 194-195, possibly affect the City's interests in "privacy, aesthetics, and safety," Pet. App. 35a, "sign" is nevertheless defined in the ordinance as specifically including "window signs," which are in turn defined as "[a]ny sign erected, attached to the outside or inside of a window, or placed immediately inside of

<sup>16</sup> Small signs may in certain circumstances be constitutionally protected in the same locations at which large billboards might be constitutionally prohibited.

a window for public display purposes to persons on the outside of such building or structure." Ordinance § 35-1 (Pet. App. 39a, 40a).

Under the ordinance, it is therefore illegal for a resident to place, anywhere on his or her property, a sign with any message or statement other than a sign advertising the property as being for sale or lease. It does not matter how large or small the sign is, whether it is visible to pedestrian or automobile traffic, whether it obscures the ability to see oncoming traffic or pedestrians, whether it is visible from other residences, parks or public places, whether it is a solitary residential sign or one of a great number of such signs on a single piece of property, or whether it relates to an event on the property where it is placed or to a local issue or election of immediate importance to the neighborhood. The display of such signs by residents in the City is absolutely forbidden in all circumstances.

**B. A Total Ban On A Protected Form Of Expression Is Constitutional Only If More Limited Regulations Would Not Achieve The City's Purpose**

This Court's decisions have properly and repeatedly made clear that if a state or political subdivision completely bans a constitutionally protected means of expression, such a total ban will be upheld, if ever, only in the most exigent circumstances. Thus, in *Schneider v. State*, 308 U.S. 147 (1939), perhaps the first of these cases, the Court invalidated a total ban on the distribution of leaflets within a municipality. After finding that leafletting is a medium of political expression with deep historical traditions, the Court weighed that free expression interest against what it recognized as the city's legitimate interest in keeping its streets "clean and of good appearance." *Id.* at 162. The Court held the total

ban unconstitutional, noting that "[a]ny burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press." *Ibid.*

More recently, the Court, in upholding a residential picketing prohibition only as it applied to picketing that is focused on a particular residence, noted that such focused picketing "is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas." *Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (emphasis added) (citing *Schneider v. State*, *supra*, *Martin v. City of Struthers*, *supra*, and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)). *Frisby* noted further that "[a] complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." 487 U.S. at 485 (emphasis added).<sup>17</sup>

<sup>17</sup> See also *Lee v. International Soc'y for Krishna Consciousness, Inc.*, 112 S. Ct. 2709, 2710 (1992) (per curiam) (invalidating ban on leafletting in an airport terminal); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981) (invalidating an ordinance because it "totally exclude[d] all live entertainment" from a municipality); *Martin*, 319 U.S. at 146-147 (emphasis added) (invalidating a municipal ordinance forbidding door-to-door solicitation, and stating that the "[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved"); cf. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988) (emphasis added) (explaining that "in the case of an ordinance that completely prohibits a particular manner of expression," the question is whether "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time").

Applying these principles to ordinances that completely ban all or almost all noncommercial residential signs from a community, lower state and federal courts have uniformly found such bans to be unconstitutional.<sup>18</sup> See, e.g., *Loftus v. Township of Lawrence Park*, 764 F. Supp. 354, 360-361 (W.D. Pa. 1991) (ban on all residential signs except "for sale" or "garage sale" signs not content-neutral); *Fisher v. City of Charleston*, 425 S.E.2d 194, 198-199 (W. Va. 1992) (invalidating ban on residential political signs); *Goward v. City of Minneapolis*, 456 N.W.2d 460, 464-468 (Minn. Ct. App. 1990) (invalidating ban on residential "political," but not campaign, signs as a content-based restriction; in dicta, finding the provision did not leave open ample alternative channels of communication and was not "narrowly tailored"); *City of Lakewood v. Colfax Unlimited Ass'n*, 634 P.2d 52, 61-62 (Colo. 1981) (en banc) (invalidating an ordinance that permitted campaign, but not other ideological, signs); *State v. Miller*, 392 A.2d 1222, 1225 (N.J. Super. Ct. App. Div. 1978) (State conceded that "a municipality is, by reason of the First Amendment, precluded from total prohibition of an individual's freedom of political expression through the technique of posting a sign on his own property"), aff'd, 416 A.2d 821 (N.J. 1980); *Farrell v. Township of Teaneck*, 315 A.2d 424 (N.J. Super. Ct. Law Div. 1974) (invalidating, as an unduly restrictive regulation, a flat ban on political signs in residential zones); *Peltz v. City of South Euclid*, 228 N.E.2d 320 (Ohio 1967) (invalidating total ban on political signs); cf. *Arlington County Republican Comm. v. Arlington County*, 983 F.2d 587, 594 (4th Cir. 1993) (invalidating regulation permitting two temporary political signs per

<sup>18</sup> Our review of published federal and state court decisions has revealed no case upholding such a ban.

residence; "the two-sign limit infringes on [free] speech by preventing homeowners from expressing support for more than two candidates when there are numerous contested elections").

The rule that emerges from these cases is that, if a complete ban within a community on a protected medium of expression is ever to be upheld, that will occur only when it is apparent not only that the community's substantial interests are furthered by such a total prohibition, but that there is a demonstrable basis for concluding that a complete ban (rather than more modest restrictions) is necessary to serve those governmental interests.<sup>19</sup> Such a finding of necessity can be made, we think, only when there is some basis in either logic or experience for concluding with reasonable confidence that restrictions short of a total prohibition will be significantly less effective in achieving the articulated governmental goals.<sup>20</sup> We therefore turn to the purposes

<sup>19</sup> The HBA, which does not impose a total ban even on the relatively large signs upon which it focuses, should not bear as heavy a burden.

<sup>20</sup> The standard we suggest is similar to that utilized by Justice Brennan in his concurring opinion in *Metromedia*. Justice Brennan there announced his intention to "apply the tests this Court has developed to analyze content-neutral prohibitions of particular media of communication," namely, whether "a sufficiently substantial governmental interest is directly furthered by the total ban, and [whether] any more narrowly drawn restriction, i.e., anything less than a total ban, would promote less well the achievement of that goal." 453 U.S. at 526-528.

We thus believe that it is appropriate to apply a stricter standard of constitutional review to legislation that completely prohibits a medium of communication within a community than the standard of constitutional review that is applied to legislation that merely regulates the time, place or manner of speech in public places in the community, while permitting the medium of commu-



of Ladue's ordinance to examine whether that test is met in this case.

**C. The City's Expressed Purpose Of Preventing The Proliferation Of An Unlimited Number Of Signs Can Almost Certainly Be Accomplished Through Regulations On The Number, Size And Placement Of Signs; In These Circumstances A Total Ban On Residential Signs Is Unconstitutional**

After the district court's initial imposition of a preliminary injunction in this case, the City of Ladue enacted the current ordinance which included, for the first time, an explicit "Declaration of Findings, Policies, Interests, and Purposes." See Ordinance Art. I (Pet. App. 35a-38a). In doing so, the City identified as its primary objectives the fostering of the "rights and values of privacy, aesthetics, and safety" within the community. Pet. App. 35a-36a. The City then declared that the evil threatening those important community values was "the proliferation of an unlimited number of signs in private, residential, commercial, industrial, and public areas of the City of Ladue." *Id.* at 36a (emphasis added). Such unlimited proliferation, it was declared, "would create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and commercial architecture[,] impair property values, substantially impinge upon the privacy and special ambience of the community, and may cause safety and traffic hazards to motorists, pedestrians, and children." *Ibid.*

One can easily agree with Ladue's governing body that the proliferation of "an unlimited number" of signs within the community might well produce some or all of

nication to be utilized in accordance with those limited regulations. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

these unfortunate consequences.<sup>21</sup> It seems equally apparent, however, that permitting only a *limited* number of residential signs in the community, especially if that permission were coupled with appropriate regulations on the size, placement and appearance of those signs, would almost certainly *not* result in those considerable evils. If, for example, residential signs were required to be placed out of traffic or pedestrian sight lines, it is difficult to see how such signs could "cause safety and traffic hazards to motorists, pedestrians, and children." Similarly, if each residential unit in Ladue were permitted to display a limited number of small window signs of the type sought to be displayed by respondent in this case then, even in the completely unlikely event that *every* residence took full advantage of this opportunity, it is difficult to believe that such displays would "create ugliness, visual blight and clutter," "tarnish the natural beauty of the landscape as well as the residential \* \* \* architecture," "impair property values," or "substantially impinge upon the privacy and special ambience of the community."

The point is simply that Ladue, in pursuit of thoroughly laudable objectives, has struck an inappropriate balance between those objectives and the constitutionally protected rights of individuals to free expression.<sup>22</sup> If an *unlimited* proliferation of signs is the

<sup>21</sup> On-site/off-site distinctions, discussed at note 27, *infra*, directly further this key interest in controlling the proliferation of outdoor signs. The HBA's restrictions on off-site signs limit sign proliferation by precluding the erection of billboards away from premises at which activities are conducted, and by limiting signs at premises to those signs pertaining to the activities conducted there. See 23 U.S.C. 131(c)(3).

<sup>22</sup> The record is devoid of evidence suggesting that the City has undertaken to determine whether a less restrictive ordinance

apprehended danger (as Ladue's ordinance states), the constitutionally appropriate governmental response is to place reasonable numerical, and perhaps other, limits on signs—not to ban them altogether so as to unnecessarily intrude on the right of residents to use a traditional, valuable and constitutionally protected mode of expression.

Such reasonable limits could certainly include a restriction on the number of signs that can be displayed at each residential unit. Indeed, Ladue has already imposed precise numerical limits of this kind. Ladue's churches, religious institutions and schools, for example, are specifically limited by the ordinance to one sign in addition to an "identification" sign, Ordinance § 35-5 (Pet. App. 41a); gasoline filling stations are specifically limited to a total of six or seven signs (depending on whether the station is located on a corner lot), Ordinance § 35-6 (Pet. App. 42a); and commercial and industrial establishments are entitled to at least three signs (six if they border on two streets), Ordinance § 35-7 (Pet. App. 43a-44a). Appropriate limits for the City's consideration might also include size limitations, which Ladue has already imposed throughout its ordinance, see, *e.g.*, Ordinance § 35-10 (Pet. App. 45a) (real estate "for sale" or

would sufficiently further its objectives. It appears that the only evidence arguably reaching this point is the "Supplemental Affidavit of Edith J. Spink," which includes a reference to a videotape of political campaign signs filmed in other jurisdictions during a Missouri election campaign. J.A. 197-198. Ms. Spink stated that on the same day she "observed a general proliferation of yard signs \* \* \* both on private property and in public areas and street rights-of-way." *Id.* at 197. There is no indication, however, that the jurisdictions Ms. Spink observed imposed, or even would want to impose, reasonable time, place and manner restrictions on such signs.

"for lease" signs limited to six square feet in area), or limitations upon where signs may be located on private property, which Ladue has also already utilized, see, *e.g.*, Ordinance § 35-6 (Pet. App. 42a) (gasoline filling station "banjo" signs may be placed "no closer to a street than the nearest edge of the road right-of-way").

Ladue's proper constitutional course is thus to utilize appropriate time, place and manner regulations,<sup>23</sup> rather than the total ban it has chosen to impose. Such an approach would fully vindicate Ladue's substantial concern with unlimited proliferation, while simultaneously preserving the essential constitutional rights of its residents.

**IV. THE FEDERAL HIGHWAY BEAUTIFICATION ACT IS A VALID TIME, PLACE AND MANNER REGULATION, RATHER THAN A TOTAL BAN ON PROTECTED RESIDENTIAL SIGNS; AS SUCH IT IS PLAINLY CONSTITUTIONAL**

In contrast to Ladue's ordinance, the federal Highway Beautification Act (HBA) does not constitute a total ban on residential signs within any community. It is, instead, a sensitively crafted time, place and manner regulation that properly balances federal aesthetic and safety concerns with the constitutional rights of individuals. While it would be inappropriate in this case for the Court to express a view on the meaning or validity of HBA provisions that are not at issue,<sup>24</sup> the HBA's limited ap-

<sup>23</sup> Indeed, the ordinance's preamble makes explicit reference both to the need for regulation of "the time, place, and manner" of the display of signs and to the necessity that signs "should be carefully regulated." Pet. App. 36a (emphasis added).

<sup>24</sup> In *Metromedia*, the Court expressly declined to express any view on the constitutionality of the HBA. See 453 U.S. at 515 n.20

proach may, we think, nevertheless be useful for purposes of comparison with Ladue's sweeping prohibitions.

One important difference between the HBA and Ladue's ordinance is that the HBA's strictures do not reach entire communities, but only apply to signs visible from, or within a 660-foot wide strip on each side of, certain major highways. 23 U.S.C. 131(b); see note *supra*.<sup>25</sup> The HBA, therefore, does not create the threat of interfering with a method for the communication and exchange of ideas within an entire local community. Moreover, even within the limited strips of land covered by the HBA, that Act does not reach *all* signs, but only those that are placed so as to be visible from "the main traveled way." 23 U.S.C. 131(b). If, for example, a residence were adjacent to a primary highway, with a local street located at the front of the home, the HBA would not require a State to regulate a sign that may be placed at the front of the residence, and thus be visible from the local street but not from the highway. Moreover, even residential signs facing the primary highway are not restricted unless they are sufficiently large so that their message is visible from a vehicle on the highway (even though such a small sign could easily serve the purpose of communication with neighbors and passersby).

(opinion of White, J.); *id.* at 534 n.11 (Brennan, J., concurring in the judgment).

<sup>25</sup> The HBA applies only in areas adjacent to the Interstate and Federal-Aid primary systems. See note 4, *supra*, and accompanying text. These two systems together account for 7.8% of all roads and streets in the United States but carry 50.6% of all the vehicle miles traveled. U.S. Dep't of Transportation, Federal Highway Administration, *Highway Statistics 1991*, at 130, 196 (1992).

In thus limiting the scope of its regulations and prohibitions, the HBA comports with the constitutional requirement that content-neutral time, place and manner regulations be "justified without reference to the content of the regulated speech," be "narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (CCNV)). See *Kovacs v. Cooper*, 336 U.S. 77 (1949). Ladue, as we have said, could have similarly tailored its regulations so as to fit the identified problem of unlimited proliferation by limiting the number, size, appearance and placement of residential signs.

The opinion of the court of appeals in this case identified the fact that Ladue's ordinance "favors commercial speech over noncommercial speech" as a principal constitutional vice of that ordinance. Pet. App. 4a. The court of appeals noted, in this connection, that Ladue's ordinance "permits commercial signs in districts zoned for commercial or industrial use, but it prohibits most noncommercial signs in those districts." *Id.* at 4a n.4.<sup>26</sup> No similar distinction favoring commercial speech is incorporated in the HBA.

Finally, the HBA contains a useful and nondiscriminatory general "on-site" exemption absent from Ladue's ordinance. Under this "on-site" provision, an occupant may display signs "advertising activities conducted on the property on which they are located." 23 U.S.C.

<sup>26</sup> The court here apparently referred to the provision of Ladue's ordinance that permits only "[c]ommercial signs in commercially zoned or industrial[ly] zoned districts." Ordinance § 35-4(i) (Pet. App. 41a) (emphasis added).



131(c)(3). This provision is applicable to noncommercial signs, as well as to commercial and industrial advertisements—"advertise", that is, is used in its non-commercial sense of "to make generally known." *Webster's Third New International Dictionary* 31 (1976). Thus, even within the HBA's conceded area of coverage, a resident such as respondent could legally display a sign announcing and inviting attendance at an anti-war meeting scheduled to take place at her residence. To take another example, a prayer vigil that is to take place at a residence within the HBA's coverage could be advertised by a sign placed at that residence, even if it were located within a completely residential area.

The presence of such a broad "on-site" exception in the HBA, applicable to noncommercial as well as commercial and industrial users, moderates any potential impact that Act might otherwise possibly have on constitutionally protected expression within its limited coverage.<sup>27</sup>

<sup>27</sup> Some courts (none addressing the HBA) have appeared to take the view that exceptions for on-site signs are necessarily content-based. See, e.g., *National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 147 (2d Cir. 1991). Other courts have upheld on-site/off-site distinctions as content-neutral restrictions based on the location of speech. See, e.g., *Wheeler v. Commissioner of Highways*, 822 F.2d 586, 589-594 (6th Cir. 1987) (addressing the HBA), cert. denied, 484 U.S. 1007 (1988).

One source of confusion regarding the effect of on-site provisions that has led some courts to proceed on the premise that they are inherently content-based is the assumption that on-site provisions necessarily favor commercial over noncommercial speech. See, e.g., Pet. App. 4a. Although the *Metromedia* plurality found that the ordinance in question there made no provision for on-site, noncommercial messages, see 453 U.S. at 513 (opinion of White, J.), not all enactments distinguishing between on-site and off-site signs share this defect. The HBA, for example, permits signs "advertising activities conducted on the property on which they

The terms of Ladue's ordinance, in contrast, limit the ap-

are located," 23 U.S.C. 131(c)(3), permission which doubtless encompasses messages pertinent to the activities of campaign offices, churches and other noncommercial groups. See *Wheeler*, 822 F.2d at 590-591. A neutral exception for on-site signs such as that incorporated in the HBA is not merely neutral with respect to the viewpoint espoused, but is entirely neutral with respect to the topics that can be addressed in permitted signs. See *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980); *Messer v. City of Douglasville*, 975 F.2d 1505, 1509 (11th Cir. 1992), cert. denied, 113 S. Ct. 2395 (1993).

This Court's ruling in *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), supports the conclusion that a regulation that depends upon the relationship of a message to a particular location may be considered to be content-neutral. There the Court upheld a state fair rule restricting certain types of speech to fixed locations (i.e., fair booths) that had to be rented. The regulated speech was thus limited to that of the group that had rented that location. Such a system may be considered as satisfying the criterion of content-neutrality because it discriminates against no viewpoint or subject matter and instead merely regulates the location of various activities. See *id.* at 648-649.

The mere fact that one must know the content of a particular sign in order to determine whether it qualifies as an on-site sign at a particular location does not, we think, mean that an on-site/off-site distinction should be deemed to be content-based. This Court's decisions have never insisted that a regulatory scheme be entirely blind to the content of expressive activities; rather, the key inquiry is whether a given restriction is "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791 (emphasis added) (quoting *CCNV*, 468 U.S. at 293); see *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). In *City of Renton*, for example, the Court upheld a scheme restricting the locations at which sexually explicit movies could be shown, even though city officials applying such an ordinance would be required to inquire into the content of particular movies in enforcing the law. 475 U.S. at 48.

plicability of any "on-site" exception to expression in "commercially zoned or industrial[ly] zoned districts" and, even within those commercial districts, permit only on-site "commercial" signs (although residential and other noncommercial uses are presumably also permitted within such zones). Ordinance § 35-4(i) (Pet. App. 41a).<sup>28</sup>

### CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1993

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<sup>28</sup> Thus, if a municipal courthouse were to be erected in Ladue, it could apparently not bear a phrase such as "Equal Justice Under Law" as an engraving on its facade. (A sign advertising a courthouse-complex souvenir shop or cafeteria would, however, be permitted). A resident also could plainly not display such a phrase, or any other like it (*e.g.*, "Welcome home Gulf troops"), at his or her home.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

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CITY OF LADUE, *et al.*,  
v. *Petitioners*,  
MARGARET P. GILLES, *Respondent*.

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Eighth Circuit

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BRIEF OF THE  
NATIONAL INSTITUTE OF MUNICIPAL LAW  
OFFICERS, INTERNATIONAL CITY/COUNTY  
MANAGEMENT ASSOCIATION, U.S. CONFERENCE  
OF MAYORS, NATIONAL LEAGUE OF CITIES, AND  
NATIONAL ASSOCIATION OF COUNTIES  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

---

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## QUESTION PRESENTED

*Amici* will address the following question:

Whether the court of appeals erred in concluding that Ladue's sign ordinance, the purpose of which is to advance the City's interests in aesthetics and safety, is content-based and subject to strict scrutiny because it contains a small number of essential exceptions that do not reflect a governmental purpose to choose appropriate subjects for public expression or debate.

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**INTEREST OF THE *AMICI CURIAE***

*Amici*, organizations whose members include city and county governments and officials throughout the United States, have a compelling interest in legal issues that affect local governments. The issue presented in this case, concerning the degree to which a local government can, consistent with the First

Amendment, regulate signs in the interest of avoiding visual blight and other problems, is a recurring one for jurisdictions throughout the country.

As evidenced by the Court's opinions in such cases as *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), and *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the serious aesthetic problems caused by signs and billboards are difficult and ubiquitous. A commentator's assessment of the aesthetic and social costs of signage merely echoes the perceptions of any observant citizen. "In many cities, sign clutter dominates the streetscape, overshadowing buildings and trees, eroding cultural and architectural diversity, ruining scenic views and historic ambience and blighting whole neighborhoods." Edward T. McMahon, *Regulating Signs*, Main Street News, No. 70 at 1, 2 (National Trust for Historic Preservation, Aug. 1991). While aesthetic problems may be most pronounced in architecturally significant or unique planned communities like Ladue, they can arise anywhere. The need to regulate signs and billboards in the interest of traffic safety is likewise universal. See, e.g., *County of Cumberland v. Eastern Federal Corp.*, 269 S.E.2d 672, 677 (N.C. App.), petition denied, 273 S.E.2d 453 (N.C. 1980); *Ghaster Properties, Inc. v. Preston*, 200 N.E.2d 328, 335-36 (Ohio 1964) (quoting *Opinion of the Justices*, 103 N.H. 268, 270 (1961)).

The Court has repeatedly recognized that the broad protections of the First Amendment do not render cities powerless to address these problems in a meaningful way. As the Court explained in *Taxpayers For Vincent* in upholding an ordinance prohibiting the posting of signs on public property:

The problem addressed by this ordinance—the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property—constitutes a significant substantive evil within the City's power to prohibit. "[T]he city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect."

466 U.S. at 807 (citation omitted).

The Court has emphasized that in evaluating speech regulations for content-neutrality, "[t]he government's purpose is the controlling consideration." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "Government regulation of expressive activity is content-neutral so long as it is 'justified without reference to the content of the regulated speech.'" *Id.* (collecting cases).

While acknowledging that the ordinance was viewpoint neutral, the court of appeals nonetheless concluded that it was content-based and subject to strict scrutiny because the ordinance's prohibition of signs contains a small number of essential exceptions. The net effect was to give no weight to the City's purpose of addressing the many problems resulting from visual blight. Contrary to the reasoning of the courts below, these essential, benign exceptions have nothing to do with controlling "the choice of permissible subjects for public debate" or "government control over the search for political truth." Pet. App. 28a (opinion of district court, quoting *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530, 538 (1980)). Indeed, there is not a scintilla of evidence that Ladue's purpose was to suppress Gilleo's sign because of its message.

Like Ladue, many other jurisdictions have sought to preserve the unique architectural, historic, or scenic character of neighborhoods and districts by banning or heavily regulating most signs. In doing so, however, they, like Ladue, have had to confront the reality that a few discrete categories of signs, such as traffic signs, are so essential to a city's functioning that they cannot realistically be prohibited. Under the erroneous standard adopted by the court of appeals, all such laws are content-based and subject to strict scrutiny. Because the court of appeals' rigid, formalistic analysis misapprehends the complexity of the problems posed by sign proliferation, *amici* submit this brief to assist the Court in its resolution of the case.<sup>1</sup>

#### INTRODUCTION AND SUMMARY OF ARGUMENT

*Amici* wholeheartedly agree with the core constitutional tenet that "the First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Boos v. Barry*, 485 U.S. 312, 318 (1988) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). This Court has, however, repeatedly recognized that the protection afforded to speech is "not absolute." *Kovacs v. Cooper*, 336 U.S. 77, 85 (1949). And while the "Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment," *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986), "[i]t has [also] been clear since this

<sup>1</sup> The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest." *Taxpayers for Vincent*, 466 U.S. at 804 (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)); see also *Metromedia*, 453 U.S. at 502 (plurality opinion) (citing *Kovacs*) (recognizing government's "legitimate interest[] in controlling the noncommunicative aspects" of billboards).

In recognition of the fact that a particular medium of communication can impose significant substantive harms on the community, the Court has held that "expression, whether oral or written . . . is subject to reasonable time, place, or manner restrictions." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The Court has also long recognized that "[e]ach method [of expression] tends to present its own peculiar problems." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952); see also *Metromedia*, 453 U.S. at 500-01 & n.8, 502 (plurality opinion). As Justice Jackson noted in *Kovacs*, each medium of expression "ha[s] differing natures, values, abuses and dangers." 336 U.S. at 97 (Jackson, J., concurring).

Signs, notwithstanding their venerable use as a "medium for expressing political, social and commercial ideas," *Metromedia*, 453 U.S. at 501 (plurality opinion) (citation omitted), are no exception. As the Court has recognized, the medium of signs imposes unique and substantial harms on the community, including visual blight, endangerment of traffic safety, and diminished property values with the consequential loss of tax revenue.

Consistent with these precepts, many cities have a strong interest in addressing the problems of visual



blight in architecturally significant, historic, or scenic areas. The most effective means of doing so would, of course, be a total ban on signs and billboards. *Cf. Taxpayers For Vincent*, 466 U.S. at 806-07 (indicating total ban is permissible). Yet, as *Ladue* recognized, it is impossible to impose such a regulatory scheme without creating a small group of essential, benign exceptions for traffic safety signs, identification signs, and the like. Under the rigid rule of content-neutrality adopted by the court of appeals, any such scheme is likely to be invalidated.

The exceptions which *Ladue* allows, however, do not demonstrate that its purpose is either to "favor some viewpoints or ideas at the expense of others," *Taxpayers For Vincent*, 466 U.S. at 804, or to "select which issues are worth discussing or debating." *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). By allowing commercial enterprises and churches to display on-site identification signs, the City is doing no more than attempting to comply with the time, place or manner test's requirements that the ordinance be "narrowly tailored" and "leave open ample alternative channels for communication of the information." *Community For Creative Non-Violence*, 468 U.S. at 293.

Indeed, given this Court's holding in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), which invalidated a ban on real estate "For Sale" signs, in part because there were no ample alternatives, city planners are placed in a veritable "catch-22." If a city prohibits too many signs, its ordinance may violate the time, place or manner test and the principles articulated in *Linmark*. Yet under the court of appeals' approach, if a city attempts to address this problem by excepting on-site commercial and church identification signs, it has engaged in

content-based discrimination and its ordinance will likely be invalidated under strict scrutiny review. But allowing on-site identification signs—which are linked to the particular zoning classification and permitted use of the property—does not raise any "realistic possibility that official suppression of ideas is afoot," *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2547 (1992), or that the government's purpose is to "select which issues are worth discussing or debating." *Mosley*, 408 U.S. at 95.

Nor do the ordinance's exceptions for various safety-related signs, road and driveway signs, and public transportation signs contravene the Court's content-neutrality jurisprudence. The governmental purposes in allowing these important messages, the promotion of the public safety and convenience, are too benign to raise any specter that the government's purpose is either to "favor some viewpoints or ideas at the expense of others," *Taxpayers For Vincent*, 466 U.S. at 804, or to "select which issues are worth discussing or debating." *Mosley*, 408 U.S. at 95. Thus, contrary to the holding of the court of appeals, *Ladue*'s ordinance is fully "justified without reference to the content of the regulated speech" and is content-neutral. *Rock Against Racism*, 491 U.S. at 791 (citation omitted). Accordingly, the ordinance should not be subjected to strict scrutiny, but should instead be reviewed under the remaining prongs of the Court's test for reasonable time, place, or manner regulations.<sup>2</sup>

<sup>2</sup> *Amici* limit their presentation to a demonstration that the court of appeals erred in treating *Ladue*'s ordinance as content-based. *Amici* do not address the complex issues involved in assessing whether the ordinance satisfies the remaining parts of the time, place, or manner test.

## ARGUMENT

### THE COURT OF APPEALS' FORMALISTIC APPROACH TO CONTENT NEUTRALITY ERRONEOUSLY FAILS TO EXAMINE THE CITY'S PURPOSES IN EXCEPTING CERTAIN SIGNS AND IMPROPERLY IMPEDES EFFORTS BY LOCAL GOVERNMENTS TO REGULATE SIGNS TO PREVENT VISUAL BLIGHT AND OTHER PROBLEMS

#### A. The Court Has Repeatedly Upheld the Power of Municipalities to Place Content-Neutral Restrictions on Expression In Order to Ameliorate Aesthetic Blight

As visual blight has come to be recognized as a serious societal problem demanding an effective response from government, the Court has often recognized that government can take meaningful steps to advance aesthetic and related values. This affirmation of the power of government to act in the public interest, initially made by the Court in zoning cases, has more recently been reiterated in the First Amendment context. The court of appeals' decision subverts this longstanding power of local government by imposing a standard for content-neutrality that no city can ever meet.

Beginning with *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Court has repeatedly affirmed the authority of municipalities to regulate nuisances in order to advance aesthetic and related goals. For example, in *Berman v. Parker*, 348 U.S. 26, 32-33 (1954), the Court reaffirmed the broad scope of municipalities' power to preserve the public welfare, noting that the concept of public welfare "is broad and inclusive" and "[t]he values it represents are spiritual as well as physical, aesthetic as well as monetary." *Id.* at 33, quoted in *Taxpayers For*

*Vincent*, 466 U.S. at 805. The *Berman* Court held that it was "within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id.* at 33. The Court accordingly upheld the condemnation of blighted housing to advance aesthetic ends, because such housing "may be an 'ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn.'" *Id.* at 32-33, quoted in *Taxpayers For Vincent*, 466 U.S. at 805. See also *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (city has legitimate interest in preserving places where "the blessings of quiet seclusion and clean air make the area a sanctuary for people"); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978) ("New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal.").

More recently, the Court has held that the First Amendment does not preclude cities from undertaking meaningful steps to advance aesthetic and related interests. On the contrary, even in the context of First Amendment challenges the Court has recognized that "municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression." *Taxpayers For Vincent*, 466 U.S. at 806. For example, in *Taxpayers for Vincent* the Court reaffirmed that a city is not powerless "to protect its citizens from unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance." *Taxpayers For Vincent*, 466 U.S. at 806 (citing *Kovacs*).



Thus, the Court has upheld, in different contexts, limitations directed at the noncommunicative aspects of expression where those limitations are necessary to address a public nuisance and restore tranquillity to the community. Most recently, in *Rock Against Racism* the Court upheld a city law requiring performers using a public amphitheater to use the sound system and technician provided by the city, on the grounds that the city had an interest in controlling noise levels "in order to retain the character of the [nearby] Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park." 491 U.S. at 792. Likewise, in *Frisby v. Schultz*, 487 U.S. 474 (1988), the Court upheld a municipality's prohibition on picketing in front of homes, citing the city's power to ensure "residential privacy" and protect "the unwilling listener." *Id.* at 484.

Billboards and signs, like these other modes of expression, frequently conflict with cities' interests in preserving the aesthetic quality of the community and advancing safety and other concerns. See, e.g., *Metromedia*, 453 U.S. at 502 (plurality opinion) ("[B]ecause it is designed to stand out and apart from its surroundings, the billboard creates a unique set of problems for land-use planning and development."). It is unquestionably within the power of a city to address both the safety and aesthetic problems such signage presents. See *id.* at 506-07 (plurality opinion) (collecting cases). Indeed, the Court has recognized that municipalities' strong interest in avoiding "visual clutter" would justify a complete ban on billboards. See *Taxpayers For Vincent*, 466 U.S. at 806-07 (citing various opinions in *Metromedia*). And in

*Taxpayers For Vincent* the Court held that "the visual assault on the citizens of Los Angeles" created by "an accumulation of signs" on public property "constitutes a significant substantive evil within the City's power to prohibit." *Id.* at 807. See also *Metromedia*, 453 U.S. at 510 (plurality opinion); *id.* at 552 (opinion of Stevens, J.); *id.* at 559-61 (Burger, C.J., dissenting). The Court has also recognized that legislatures may reasonably conclude that signs pose a traffic safety hazard. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 109 (1949); see also *Metromedia*, 453 U.S. at 509 (plurality opinion); *id.* at 555, 560 (Burger, C.J., dissenting).

Contrary to these teachings, the decision below prevents land use planners from ever being able to adequately address the "visual assault . . . presented by an accumulation of signs," notwithstanding this Court's recognition that such signage "constitutes a significant substantive evil within the City's power to prohibit." *Taxpayers For Vincent*, 466 U.S. at 807. Likewise, it prevents cities from adequately addressing the danger to traffic safety caused by sign proliferation. Cf. *Railway Express Agency*, 336 U.S. at 109. Finally, it prevents cities from taking effective steps to preserve property values and the tax base. See *Metromedia*, 453 U.S. at 552 (opinion of Stevens, J.).

The First Amendment does not require the heavy constraints which the court of appeals placed on the ability of local governments to redress aesthetic and other concerns through sign regulations. Rather, these constraints result from the court of appeals' failure to examine Ladue's underlying purposes in creating the exceptions to the ordinance's general prohibition of signs.



**B. Ladue's Ordinance Is Content-Neutral Because Its Regulation of Signs Is Justified Without Reference to Content**

As the court of appeals recognized, Ladue, in furtherance of its substantial interests in preserving the aesthetics of the community, enhancing traffic safety, and maintaining the value of real estate, enacted an ordinance which generally prohibits the display of signs within the city. Pet. App. 2a. The ordinance, however, provides a small number of essential, benign exceptions to this general prohibition. *Id.*; see also Pet. App. 40a-41a. The ordinance thus allows for the display of the following signs: municipal signs; subdivision and residence identification signs; road and driveway signs; health inspection signs; school, church and religious institution signs announcing the institutions' names, services, activities and functions; signs identifying non-profit organizations, public transportation stops and safety hazards; on-site commercial signs in districts zoned for commercial or industrial use, and ground signs advertising the sale or rental of real estate. *Id.*

Relying on the plurality opinion in *Metromedia*, the court of appeals concluded that Ladue's ordinance discriminated on the basis of content for two reasons. First, the court reasoned that the ordinance "favors commercial speech over noncommercial speech" because it "permits commercial signs in districts zoned for commercial or industrial use [while] it prohibits most noncommercial signs in those districts." Pet. App. 4a & n.4. Second, the court asserted, without elaboration, that the ordinance "favors certain types of noncommercial speech over others." *Id.* As the district court held, the ordinance's exceptions for "cer-

tain signs bearing noncommercial messages such as municipal signs, subdivision identification signs, residence identification signs, certain road signs and health inspection signs" demonstrate "content selectivity with respect to noncommercial speech . . . allow[ing] the City to determine 'which issues are worth discussing or debating . . .'" Pet. App. 28a (quoting *Mosley*, 408 U.S. at 96). See also *id.* at 4a.

This formalistic rationale plainly fails to support the court of appeals' conclusion that Ladue's ordinance discriminates on the basis of content. As set forth below, these various exceptions do not demonstrate that Ladue's purpose is to discriminate on the basis of content. On the contrary, the purpose of the City's exceptions is to permit the minimum signage possible consistent with the advancement of the City's interests in safety and aesthetics, as well as with the Constitution.<sup>3</sup> It is thus clear that, under this Court's cases, the ordinance is content-neutral.

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<sup>3</sup> The legislative record fully demonstrates that petitioners' ordinance was enacted with the purpose of addressing the harms caused by sign proliferation. As the findings accompanying the ordinance state:

the proliferation of an unlimited number of signs in private, residential, commercial, industrial, and public areas of the City of Ladue would create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and commercial architecture, impair property values, substantially impinge upon the privacy and special ambience of the community, and may cause safety and traffic hazards to motorists, pedestrians, and children[.]

Pet. App. 36a. Moreover, the record on summary judgment demonstrates that these findings are not simply camouflage for an attempt to suppress speech on the basis of its content.

As the Court has explained, “[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of its disagreement with the message it conveys.” *Rock Against Racism*, 491 U.S. at 791; see also *Community For Creative Non-Violence*, 468 U.S. at 295. The Court has also noted “that a regulation that ‘does not favor either side of a political controversy’ is nonetheless impermissible because the ‘First Amendment’s hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic.’” *Boos*, 485 U.S. at 319 (quoting *Consolidated Edison Co.*, 447 U.S. at 537). In determining whether a regulation is content-neutral, “[t]he government’s purpose is the controlling consideration.” *Rock Against Racism*, 491 U.S. at 791. Accordingly, the Court has frequently stated that “[g]overnment regulation of expressive activity is content-neutral so long as it is ‘justified without reference to the content of the regulated speech.’” *Id.* (emphasis in original) (quoting *Community For Creative Non-Violence*, 468 U.S. at 293).

The court of appeals expressly “recognize[d] that the ordinance is viewpoint neutral.” Pet. App. 4a

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The affidavit of Malcolm C. Drummond, a professional city planner with more than forty years’ experience (including nearly thirty years in the St. Louis, Missouri area), demonstrates not only that Ladue has engaged in a longstanding and comprehensive effort to maintain the aesthetics of the community, but also that sign proliferation poses a substantial safety hazard. J.A. 144-57. The Drummond affidavit also demonstrates that, unlike Ladue, other cities in the St. Louis area which do not limit signs experience visual blight. *Id.* at 154-56.

n.5. Therefore, the court of appeals’ conclusion that the ordinance discriminates on the basis of content must rest on the premise that the ordinance’s exceptions demonstrate that Ladue’s purpose is to choose the subject matter of public debate. See Pet. App. 4a (citing *National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 147 (2d Cir. 1991); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 248-49 (9th Cir. 1988)). This premise is erroneous.

As an initial matter, *amici* question the court of appeals’ reliance on the City’s regulations regarding signage in commercially zoned districts for assessing the validity of its regulations for residential districts. Notwithstanding the fact that the City allows commercial signs in commercial districts, the City prohibits both commercial and non-commercial signs in residential areas. Respondent could no more have displayed a sign advertising an auto repair shop than one expressing opposition to the Persian Gulf war. The Court has, of course, long recognized the unique importance of residential neighborhoods as a refuge from “‘the hurlyburly of the outside business and political world.’” *Carey v. Brown*, 447 U.S. 455, 471 (1980) (quoting *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring)). That the City allows commercial premises to display on-site “commercial signs” in its commercially zoned districts is not probative of whether its purpose in prohibiting signs in residential areas is “content-based.” The differing characters and purposes of commercially and residentially zoned districts justify the disparate treatment.

In addition, there are two other reasons why the court of appeals’ analysis is in error. First, as dis-



cussed *infra* at 17-21, the decision below fails to recognize the considerable tension that exists between the concept of content neutrality and the requirements that a time, place or manner restriction be "narrowly tailored to serve" the government's significant interests and "leave open ample alternative channels for communication." *Community For Creative Non-Violence*, 468 U.S. at 293. Ladue's sign ordinance has necessarily been tailored to the different permitted uses under its zoning plan, as well as to the holding of *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). In accordance with Ladue's land use and zoning scheme and the character of the activity taking place on site in commercial districts, the City allows certain types of signs in commercially zoned areas which are not allowed in residential areas. Thus, in allowing commercial signs on commercially zoned properties, the ordinance simply reflects the character of the activity taking place on the premises, not an intent to suppress certain messages.

Second, as discussed *infra* at 21-23, the ordinance's remaining exceptions for municipal signs, road and driveway signs, health inspection signs, public transportation and stop signs, and safety hazard signs, allow signs that indisputably convey important messages. *Amici* respectfully submit, however, that the governmental purposes in allowing these messages—the promotion of the public safety and convenience—are too benign to raise any specter that the government's goal is to "select which issues are worth discussing or debating," *Mosley*, 408 U.S. at 96, or to "prohibit[] . . . public discussion of an entire topic." *Boos*, 485 U.S. at 319 (quoting *Consolidated Edison Co.*, 447 U.S. at 537).

### C. The Ordinance's Exceptions For Commercial And Church Signs Are Justified Because There Are No Ample Alternatives To On-Site Identification Signs

The reasoning of the court of appeals places municipal land use planners in a veritable "catch-22" which greatly jeopardizes their ability to adequately address such serious problems as visual blight, traffic safety, and maintaining the property tax base. If, for example, the City attempted to redress the purported content-discrimination by extending its prohibition to commercial signs and church signs, it would risk running afoul of the time, place or manner test's requirements that the ordinance be "narrowly tailored" and "leave open ample alternative channels for the communication of the information." See *Community For Creative Non-Violence*, 468 U.S. at 293; see also *Linmark*, 431 U.S. at 93. Yet, under the court of appeals' approach, the City's attempt to satisfy these constitutional requirements by allowing businesses to have commercial signs and churches to have announcement signs renders its ordinance content-based and subject to strict scrutiny.

The flaw in the court of appeals' reasoning is underscored by the analysis of *Linmark*. In *Linmark*, the Court invalidated a municipal ordinance prohibiting the posting of real estate "For Sale" signs. 431 U.S. at 86. In doing so, the Court rejected the municipality's argument that the ordinance was permissible as a time, place or manner regulation. *Id.* at 93-94. In the Court's view, "serious questions exist[ed] as to whether the ordinance 'le[ft] open ample alternative channels for communication.'" *Id.* at 93 (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)). While recognizing that "in theory sellers remain free to employ a number of different alter-



natives" in selling their homes, the Court deemed "[t]he options to which sellers realistically are relegated—primarily newspaper advertising and listing with real estate agents" not to be ample alternatives for three reasons. *Id.* First, these options "involve[d] more cost and less autonomy than 'For Sale' signs." *Id.* (citations omitted). Second, they were "less likely to reach persons not deliberately seeking sales information." *Id.* (citations omitted). Finally, such options might "be less effective media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold." *Id.* (citation omitted).

*Amici* respectfully submit that a sign ordinance prohibiting commercial establishments from displaying on-site identification signs could be vulnerable to the same criticisms which led to the invalidation of the ordinance in *Linmark*. While commercial establishments could, of course, advertise their street location through newspapers or other mediums such as television or radio, those options would entail far more cost. And without being able to display an on-site identification sign, a commercial establishment would be unlikely to attract the patronage of those individuals just passing through the town or unfamiliar with its location.

Accordingly, *Linmark* suggests that such an ordinance might not satisfy the test for time, place or manner regulations because it would not "leave open ample alternative channels for communication of the information." *Community For Creative Non-Violence*, 468 U.S. at 293. But under the court of appeals' rationale, the city's attempt to address this problem by excepting the on-site identification signs of commercial establishments amounts to content-based dis-

crimination. See Pet. App. 4a & n.4 (concluding that Ladue's ordinance is "content-based" because it "favors commercial speech over noncommercial speech" by "permit[ting] commercial signs in districts zoned for commercial or industrial use, but . . . prohibit[ing] most noncommercial signs in those districts").

*Amici* respectfully submit that the court of appeals' rationale is erroneous not only because it fails to recognize the constitutional basis for the exception for on-site identification signs, but also because it fails to take into account the nexus between the particular sign and the zoning classification or permissible use of the property. Under the court of appeals' approach, any exceptions a city allows in a sign ordinance for the on-site identification of a premises renders an ordinance content-based—no matter how closely tied the exceptions are to the particular zoning classification or permissible use of a property. Yet allowing an exception for an on-site identification sign plainly does not raise any "realistic possibility that official suppression of ideas is afoot," *R.A.V.*, 112 S.Ct. at 2547, or that the government's purpose is to "choose 'which issues are worth discussing or debating.'" *Consolidated Edison Co.*, 447 U.S. at 538 (quoting *Mosley*, 408 U.S. at 96). Indeed, there is not a scintilla of evidence that Ladue's sign ordinance was enacted in order to suppress speech based on its content. Cf. *Linmark*, 431 U.S. at 95-97 (prohibition of "For Sale" signs invalid because directed at content of signs).

The court of appeals' disregard of the nexus between the permitted on-site identification signs and the underlying properties' permitted uses has dis-

turbing ramifications for the ability of city planners to regulate for the common good. Because under the court of appeals' rationale *Ladue* has engaged in content-discrimination, the court of appeals' holding casts serious doubt on whether *Ladue*, or thousands of other municipalities throughout the country, can even ban commercial signs in residential neighborhoods. But just as "a pig in the parlor instead of the barnyard" can be a nuisance, *Ambler Realty*, 272 U.S. at 388, so too can be signs which have no nexus to a property's use. It can hardly be disputed that if respondent had placed a sign on her property advertising a local pizza parlor, that sign would be an eyesore. But under the court of appeals' rationale, *Ladue*'s ordinance is content-based and any attempt to prohibit such signs would likely be invalidated under strict scrutiny review. The court of appeals' problematic approach to content-neutrality analysis effectively denies municipal officials the authority to take narrowly tailored measures to address the "the substantive evil—visual blight—. . . created by the medium of expression itself." *Taxpayers For Vincent*, 466 U.S. at 810; cf. *City of Renton*, 475 U.S. at 48 (upholding zoning ordinance directed at adult theaters because city's "'predominate' intent" was to "prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life.'" (citation omitted)).

The court of appeals' analysis is contrary to the Court's repeated admonition that "[t]he government's purpose is the controlling consideration" in assessing content neutrality, *Rock Against Racism*, 491 U.S. at 791, and that "[g]overnment regulation of expressive activity is content-neutral so long as

it is 'justified without reference to the content of the regulated speech.'" *Id.* (quoting *Community for Creative Non-Violence*, 468 U.S. at 293). *Ladue*'s exceptions for on-site identification signs are linked to the particular premise's zoning classification and character of use and are themselves designed to ensure that the sign prohibition will not contravene this Court's requirement that the ordinance "leave open ample alternative channels for communication." *Linmark*, 431 U.S. at 93 (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)). Accordingly, the ordinance "is 'justified without reference to the content of the regulated speech'" and is content-neutral. *Rock Against Racism*, 491 U.S. at 791 (quoting *Community For Creative Non-Violence*, 468 U.S. at 293).

**D. The Ordinance's Exceptions for Signs Promoting Public Safety and Convenience Do Not Render the Ordinance Content-Based**

In addition to on-site identification signs, the ordinance also permits municipal signs such as traffic control signs, no parking signs, and road signs; health inspection signs; safety hazard signs; and signs denoting public transportation stops. Pet. App. 40a-41a. These signs can, of course, be characterized, as the district court characterized them, as conveying "non-commercial" messages. See Pet. App. 28a. *Amici* submit, however, that these signs cannot validly be the basis for the court of appeals' unexplained conclusion that the ordinance "favors certain types of noncommercial speech over others," Pet. App. 4a, or for the holding of the district court that such signs demonstrate that *Ladue*'s purpose was "to



determine 'which issues are worth discussing or debating . . . .' Pet. App. 28a (quoting *Mosley*, 408 U.S. at 96).

As the Court has frequently stated, "[t]he government's purpose is the controlling consideration" in assessing content neutrality. *Rock Against Racism*, 491 U.S. at 791. The aforementioned signs, which have long been indispensable to the nation's cities and towns, unquestionably convey important messages—one need only imagine the result of removing stop signs from a busy intersection. But to suggest, as the district court did, that permitting such signs demonstrates that Ladue's purpose is "to determine 'which issues are worth discussing or debating,'" or that it is attempting to gain "control over the search for the political truth," Pet. App. 28a, trivializes the First Amendment. It is evident that the government's purpose in excepting such signs is the promotion of the public safety and convenience, not the "'prohibition of public discussion of an entire topic,'" *Boos*, 485 U.S. at 319 (quoting *Consolidated Edison Co.*, 447 U.S. at 537), or the choosing of the "permissible subjects for public debate." *Consolidated Edison Co.*, 447 U.S. at 538.<sup>4</sup> Indeed, a prohibition of these signs would undermine the City's stated purpose of promoting public safety. To the extent the court of appeals' conclusion that Ladue's ordinance "favors certain types of noncommercial speech

<sup>4</sup> *Amici* acknowledge that the ordinance also excepts signs advertising the sale or rental of real estate. Pet. App. 41a. This exception, which is required by state law, see Mo. Rev. Stat. § 67.317 (1992), does not demonstrate that the City's purpose is to choose the appropriate subject matter for public debate. Cf. *Linmark*, 431 U.S. at 92-96 (invalidating municipal prohibition of "For Sale" signs).

over others" rests on the ordinance's exceptions for signs promoting public safety and convenience, it is erroneous because these exceptions are not indicative of a governmental purpose to engage in content-discrimination.

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 15, 1993



No. 92-1856

Supreme Court, U.S.  
**FILED**

**NOV 16 1993**

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

CITY OF LADUE, *et al.*,

*Petitioners,*

v.

MARGARET P. GILLES,

*Respondent.*

On Writ of Certiorari To  
The United States Court of Appeals  
For the Eighth Circuit

BRIEF OF THE STATES OF HAWAII, INDIANA,  
MARYLAND, NEW HAMPSHIRE, NEW JERSEY,  
PENNSYLVANIA AND VERMONT AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER

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## **QUESTIONS PRESENTED**

1. Whether the court of appeals erroneously held that the Ladue sign ordinance is content-based in violation of the First Amendment because it allows limited exceptions to its general prohibition of all signs even though the ordinance has a content-neutral purpose to prohibit the proliferation of signs which cause visual blight, create safety hazards and diminish the value of real estate.

2. Whether the court of appeals erroneously held that the limited exceptions in the Ladue sign ordinance favor commercial speech over noncommercial speech rendering the ordinance unconstitutional.



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No. 92-1856

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

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CITY OF LADUE, *et al.*,

Petitioners,

v.

MARGARET P. GILLES,

Respondent.

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On Writ of Certiorari To The  
United States Court of Appeals for the Eighth Circuit

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**BRIEF OF THE AMICI CURIAE STATES  
IN SUPPORT OF PETITIONERS**

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Pursuant to Sup. Ct. R. 37, the signatory States  
respectfully submit this brief as amici curiae in support  
of Petitioners.



## **INTEREST OF THE AMICI CURIAE**

This case involves government's ability to manage effectively the control of signs for purposes of protecting the traveling public and minimizing visual blight caused by the proliferation of signs. The Eighth Circuit's decision severely restricts that ability and precludes government efforts to effectively regulate signs absent a total ban of all signs -- an entirely impractical and unworkable solution. Moreover, the Eighth Circuit analysis calls into question the constitutionality of the states' existing laws prohibiting outdoor signs along federal-aid primary highways pursuant to the Highway Beautification Act, 23 U.S.C. §131 *et seq.*, thus jeopardizing the public investment in those highways and their continued safety, recreational value and surrounding natural beauty.

These consequences will be doubly burdensome in that states face a ten percent reduction of federal highway funds for any failure to effectively control the erection and maintenance of outdoor advertising signs, displays and devices in designated areas. Any reduction in federal funding will have particularly harsh effects in today's economic environment in which the states' highways and transportation infrastructure require increased, not decreased, expenditures for purposes of maintenance and repair.

## **ARGUMENT**

### **I. THE EIGHTH CIRCUIT'S DECISION THREATENS STATE HIGHWAY BEAUTIFICATION LAWS.**

The issue in this case is whether the Ladue sign ordinance is subject to strict scrutiny as a content-based

regulation because it allows limited exceptions to its general prohibition on noncommercial and commercial signs, even though the legislative purpose for the exceptions is content-neutral and the excepted signs are limited to those conveying information related to traffic safety, real estate for sale or lease, and on-site identification information.

The Eighth Circuit held that the Ladue ordinance is content-based because it favors commercial speech over noncommercial speech and favors certain types of noncommercial speech over others. The Eighth Circuit further held that, under the secondary effects doctrine, the Ladue ordinance violates the First Amendment because Ladue has not shown that the prohibited signs cause more aesthetic, safety, and property value problems than do the

permitted signs, and because it has "singled out" certain categories of signs for discriminatory treatment.

The "all or nothing" approach of the Eighth Circuit severely impairs the states' ability to control the proliferation of signs without banning all signs and calls into question the constitutionality of numerous State laws regulating the proliferation of signs along federal-aid primary highways in compliance with the HBA. Unless this Court reverses that decision and clarifies the law in this area, states will be greatly hampered in their ability to protect the safety, recreational value and surrounding scenic beauty of their highways, and state reliance on federal highway funds contingent on the enactment and enforcement of such protections will be jeopardized.

**A. Federal Provisions for  
Highway Beautification.**

The States have a long-standing commitment to the enhancement of the scenic character of the nation's major highways, by limiting billboards and other visual eyesores. After the enactment of the Federal-Aid Highway Act of 1958, Pub. L. No. 85-381, 72 Stat. 89 (1958), states entered into agreements with federal agencies for state regulation of billboards adjacent to Interstate highways to control the erection and maintenance of signs in accordance with the criteria contained in the Act and governing regulations. The stated purpose of the Act was to

promote the safety, convenience, and enjoyment of public travel \* \* \* [and] to control the use of and to improve areas adjacent to the Interstate System by controlling the erection and maintenance of outdoor advertising signs, displays,

and devices adjacent to that system.

72 Stat. at 95.<sup>1</sup> States, such as Maryland, that entered such agreements, and controlled signs in accordance with the applicable criteria, were entitled to "bonus" payments of additional federal highway aid. This program is still in effect today. See 23 U.S.C. §131(j); 23 C.F.R. §§750.101 - 750.110.

The states strengthened their commitment to controlling billboards after the passage of the Highway Beautification Act (HBA), Pub. L. No. 89-285, 79 Stat. 1028 (1965). That Act was designed "to protect the public investment in \* \* \* highways, and to promote the safety and recreational value of public highways, and to preserve natural beauty." 23 U.S.C.

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<sup>1</sup> The Interstate system is a limited network of highways linking major metropolitan areas and industrial centers. See 23 U.S.C. §103(e).



§131(a). Under the Act, on penalty of a ten (10%) percent reduction of federal highway funds, states provide for the "effective control of the erection and maintenance \* \* \* of out-door advertising signs, displays, and devices" in designated areas within specified distances of Interstate highways or of highways designated as part of the state's "primary system."<sup>2</sup> 23 U.S.C. §131(b). All 50 states have

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<sup>2</sup> The "primary system," which refers to "federal-aid primary system," consists of a limited percentage of major state highways, which are not part of the Interstate system but which receive federal highway aid. See 23 U.S.C. §103(b)(1) (1988). Recently, that designation has been superseded by the Intermodal Surface Transportation Efficiency Act of 1991, which calls for the creation of a National Highway System by 1995. See Pub. L. No. 102-240, §1006, 105 Stat. 1923-27 (1991). Congress simultaneously amended the HBA to define "primary system" as "the Federal-aid primary system in existence on June 1, 1991, and any highway which is not on such system but which is on the National Highway System." 23 U.S.C. §131(t).

adopted programs controlling outdoor signs<sup>3</sup> in order to comply with the HBA.<sup>4</sup>

The HBA defines "effective control" in terms of the types of signs to be permitted within the protected areas. 23 U.S.C. §131(c). Signs within the designated areas are generally prohibited with a few exceptions such as (1) "directional and official signs," including but not limited to those pertaining to natural wonders, scenic and historical attractions; (2) signs "advertising the sale or lease of property upon which they are located"; (3) signs "advertising activities

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<sup>3</sup> A complete listing of all 50 state laws appears in the West's annotated codes for each state's law pursuant to the HBA. See, for example, Cal. Business and Professions Code Ann., §5200 (1993 Supp.).

<sup>4</sup> State compliance with the Act, including the effectiveness of their control programs, is monitored by the Federal Highway Administration, United States Department of Transportation, pursuant to comprehensive regulations set forth at 23 C.F.R. Part 750.

conducted on the property on which they are located"; (4) "landmark signs"; and (5) signs "advertising the distribution by nonprofit organizations of free coffee." 23 U.S.C. §131(c). The Act also provides for further exceptions in commercial and industrial areas. 23 U.S.C. §131(d).

#### **B. The Maryland Statute**

As have all other states, Maryland has enacted legislation to regulate billboards pursuant to the HBA. See Md. Transp. Code Ann., §8-725 *et seq.*<sup>5</sup> Like the

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<sup>5</sup> Md. Transp. Code Ann., Subtitle 7 provides for the "Regulation of Outdoor Advertising." This subtitle is divided into six subparts. Part I. "Definitions; General Provisions;" Part II. "Licensing of Outdoor Advertising Business;" Part III. "Outdoor Signs Along State Highways Generally;" Part IV. "Outdoor Signs Along Federal-Aid Primary Highways;" Part V. "Outdoor Signs Along Expressways;" and Part VI. "Enforcement and Penalties." In this brief, we focus on those provisions of the Maryland law set forth in Part IV that deal with the placement of signs along highways covered by the HBA, and that were enacted specifically to comply with the HBA.

majority of state statutes, the Maryland statute provides that "except for on premise advertising, outdoor advertising along and adjacent to the federal-aid-primary system of highways is a commercial use of these highways that should be regulated to: (1) prevent unreasonable distraction of the drivers of motor vehicles"; (2) "prevent confusion ... and interference with the effectiveness of traffic regulations"; (3) "promote the prosperity, economic well-being, health, safety, morals, order, convenience, and general welfare"; (4) "promote the enjoyment of travel ... and protect[] ... the public investment in highways"; and (5) "preserve and enhance the natural scenic beauty or esthetic features and values of these highways and their adjacent areas." Md. Transp. Code Ann., §8-726(a). The Maryland statute, like most state statutes, further

adopts the public policy reasons declared by the Congress in the HBA. The statute applies to signs along or near a federal-aid primary highway if "the sign is wholly or partly visible from the main traveled way" and is "660 feet or less from the nearest edge of the right-of-way or more than 660 feet and intended to be read from the main traveled way." Md. Transp. Code Ann., §8-727(a). It does not apply to "on premise outdoor signs."<sup>6</sup> Md. Transp. Code Ann.,

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<sup>6</sup> "On premise outdoor signs" is defined to mean any outdoor sign that, regardless of content, is designed, intended or used to advertise or inform the traveling public of: (1) the sale or lease of the property on which its is located; (2) the sale or lease of a product grown, produced, or manufactured on the property on which it is located; or (3) the name of the owner, agent, assignee, or lessee of the property on which it is located. "Outdoor sign" means any "outdoor sign, ... billboard, device, or other thing that is designed, intended, or used to advertise or inform the traveling public." Md. Transp. Code Ann., §8-701(d) and (e). In addition, official and "on premise" signs, as defined in 23 U.S.C. §131(c) of the HBA are exempt. See §8-732(e)(4).

§8-727(c). Again, like most other state statutes, the Maryland statute generally prohibits private property owners from allowing others to use their property to erect or maintain signs unless the sign is in "a commercial or industrial area" or the sign is "in an urban area and more than 660 feet from the nearest edge of the right-of-way of the highway." Md. Transp. Code Ann., §8-728.

Like the Ladue ordinance, the Maryland highway beautification statute distinguishes between certain categories of signs, exempting from the general prohibition "on premise outdoor signs," including real estate for sale or lease signs relating to the property, signs identifying the owner, agent, assignee or lessee of the property, directional and official signs relating to natural wonders, scenic and historical attractions,



landmarks and signs advertising activities conducted on the property. Under the reasoning of the Eighth Circuit, such exemptions may be deemed content-based, subjecting the Maryland statute, and similar HBA statutes in other states, to strict scrutiny. This Court should reverse the decision below and remove the impediments it poses to the states' ability to erect effective and practical controls on the proliferation of signs pursuant to the HBA.

**II. AN OTHERWISE CONTENT-NEUTRAL SIGN ORDINANCE IS NOT A CONTENT-BASED RESTRICTION, AND THEREFORE SUBJECT TO STRICT SCRUTINY, MERELY BECAUSE IT GRANTS EXCEPTIONS FOR SIGNS THAT CANNOT SUFFICIENTLY CONVEY THEIR MESSAGE BY ANY ALTERNATIVE MEDIA.**

**A. Signs Are Subject To Reasonable Time, Place and Manner Restrictions So Long As The Restrictions Are Content-Neutral.**

Signs have a primary effect as a means of communication or "speech" entitling them to First Amendment protection. See Metromedia, Inc., v. City of San Diego, 453 U.S. 490, 501-02 (1981)(plurality opinion). They also have substantial secondary or non-communicative aspects that are the legitimate subject of land-use, traffic safety and aesthetic concern. Id. at

501-02, 509. Since signs visible to motorists attract their attention, the proliferation of such signs poses a risk to traffic safety. *Id.* at 509.<sup>7</sup> "Similarly, billboards, by their very nature, wherever located and however constructed, can be perceived as an esthetic harm."<sup>8</sup> *Id.* at 510. The dual concerns of traffic

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<sup>7</sup> In *Metromedia, supra*, this Court declined "to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Id.* at 509.

<sup>8</sup> It is well settled that a state may legitimately exercise its police powers to advance aesthetic values. *E.g., Members of City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954). "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." *Berman v. Parker*, 348 U.S. at 33. See also *Penn Central Transportation Co. v. The City of New York*, 438 U.S. 104, 129 (1978); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926); *Welch v. Swasey*, 214 U.S. 91, 108 (1909).

safety and the preservation of natural beauty underlie both the Ladue ordinance in question as well as states' efforts to limit signs along primary highways in accordance with the HBA.

This Court has long recognized that legitimate government interests in regulating the noncommunicative aspects of speech can justify regulations that may have a significant impact on its communicative aspects as well. *E.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)(sleeping in public park to communicate views regarding homeless interferes with general use of park); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)(adult theatres cause economic and aesthetic blight). The traditional test for evaluating whether such content-neutral government regulations

violate the First Amendment is the "time, place, manner" test. E.g., Barnes v. Glen Theatre, Inc., 111 S.Ct. 2456, 2461 (1991); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46 (1986); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981); see United States v. O'Brien, 391 U.S. 367 (1968).

The Court summarized the three-part "time, place, manner" test used to evaluate such regulations as follows:

Our cases make clear \* \* \* that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

Time, place and manner restrictions have been found appropriate regarding such quality of life issues as "loud and raucous sound trucks," Kovacs v. Cooper, 336 U.S. 77 (1949), signs posted on public property, Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 446 U.S. 789, 806 (1984), and the loud amplification of music



intruding into residential areas, Ward v. Rock Against Racism, 491 U.S. 781 (1989).

The Eighth Circuit rejected application of a "time, place, manner" test to the Ladue ordinance in question and subjected it instead to strict scrutiny as a "content-based" restriction. The circuit court reached this result because, in the court's view, the ordinance distinguished between commercial and noncommercial speech and favored certain types of noncommercial speech over others.

This reading of the ordinance was in error, and the conclusion that the ordinance's limited exceptions were content-based was plainly wrong. The Ladue ordinance, like state laws on highway beautification, prohibits all signs regardless of content-based distinctions, with limited exceptions for signs

conveying messages relating to traffic safety, official information, real estate for sale or rent signs and onsite identification information.<sup>9</sup> These exceptions, properly understood, are not a consequence of Ladue's desire to look favorably on the content of certain

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<sup>9</sup> The permitted signs in the Ladue ordinance include municipal signs, subdivision and residence identification signs, road signs and driveways signs, health inspection signs, signs for churches, religious institutions and schools, identification signs for not-for-profit organizations, signs identifying the location of public transportation stops, signs advertising the sale or rental of real property and "commercial" signs in commercially zoned or industrial zoned districts.

The Ladue ordinance's use of the word "commercial" may have led to its being misconstrued by the Eighth Circuit to contain content-based distinctions between commercial and non-commercial signs in commercial and industrial areas. Upon careful examination of Sections 35-6, 35-7, 35-8, and 35-9, however, it is apparent that in commercial and industrial areas, the Ladue ordinance merely excepts signs that identify or advertise the businesses, products, services or activities to be found at each location. For these unique messages bearing a connection to that location, there exist no adequate alternative media.

commercial or noncommercial messages. Rather, these exceptions were carved out in the Ladue ordinance, as in the state highway beautification laws, to permit signs which send messages, regardless of their content, that cannot be sufficiently expressed via any alternative media. For example, such exceptions permit passersby with no access to other modes of communication to identify that which they are looking for, i.e., residences, businesses, churches and schools, as well as traffic safety information. As discussed in Part C, infra, such ordinances should not be deemed content-based on these grounds alone.

In holding that the ordinance constitutes a "content-based" regulation, the Eighth Circuit wrongly focused on perceived distinctions between commercial and noncommercial signs, citing Metromedia, Inc. v.

City of San Diego, 453 U.S. 490 (1981).<sup>10</sup> This perception fails to discern the actual nature of the exceptions carved out by the Ladue ordinance, and improperly characterizes them as distinguishing between types of commercial and noncommercial speech entitled to protection rather than as exceptions for on-site messages for which there are no adequate alternative modes of expression.

Both Justice Brennan and Chief Justice Burger warned, in Metromedia, of the dangers of unduly emphasizing distinctions between commercial and noncommercial speech when approaching the issues

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<sup>10</sup> In Metromedia, no constitutional theory was able to command a majority, and one Justice referred to the resulting opinions as "a virtual Tower of Babel." Id. at 569 (Rehnquist, J., dissenting). In the absence of a single opinion stating the "narrowest ground" for decision, the basis for the Eighth Circuit's reliance on Metromedia is unclear.

raised by sign restrictions. See Metromedia, 453 U.S. at 538-40 (Brennan, J., concurring); id. at 564-67 (Burger, C.J., dissenting). Supreme Court cases "recognize the difficulty in making a determination that speech is either "commercial" or "noncommercial." Id. at 539 (Brennan, J., concurring). Indeed, any analysis based on a conclusion that the Constitution requires preferential treatment for noncommercial speech is clearly incorrect in light of this Court's ruling in City of Cincinnati v. Discovery Network, Inc., 113 S.Ct. 1505, 1511 (1993)(overturning ordinance banning newsracks distributing commercial publications while exempting newsracks distributing noncommercial publications, stating such an ordinance "attaches more importance to the distinction between commercial and noncommercial speech than our cases

warrant and seriously underestimates the value of commercial speech").

**B. A Sign Ordinance Is Content-Neutral Provided It Is Justified Without Reference to the Content of the Regulated Speech.**

An ordinance is "content-neutral" as long as it is "justified without reference to the content of the regulated speech." Ward v. Rock Against Racism, 491 U.S. at 791. A government may regulate the "time, place, or manner" of speech as long as the regulation is not "'conditioned upon the sovereign's agreement with what a speaker may intend to say.'" R.A.V. v. City of St. Paul, Minnesota, 112 S.Ct. 2538, 2547 (1992), quoting Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 555 (1981)(Stevens J., dissenting in part). A government may "not regulate



use based on hostility -- or favoritism -- towards the underlying message expressed." R.A.V., 112 S.Ct. at 2545. Compare Frisby v. Schultz, 487 U.S. 474 (1988)(upholding content-neutral ban on targeted residential picketing) with Carey v. Brown, 447 U.S. 455 (1980)(invalidating a ban on residential picketing that exempted labor picketing). The Ladue ordinance should be deemed content-neutral because its purpose is to control the secondary effects of speech, not to control the message or content of the signs permitted by the exceptions.

Emphasizing the relevant consideration to be the intent of the regulation, this Court has emphasized that the First Amendment imposes not an "underinclusiveness" limitation, as impliedly imposed by the Eighth Circuit, "but a 'content discrimination'

limitation upon a State's prohibition of proscribable speech." R.A.V. v. City of St. Paul, Minnesota, 112 S.Ct. 2538, 2545 (1992). "The validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." Ward v. Rock Against Racism, 491 U.S. at 801. So long as there is a reasonable relationship between the regulation and its goals, courts should defer to a government's reasonable judgment as to the best way of addressing the problems it faces. Ward v. Rock Against Racism, 491 U.S. at 800. Thus, a regulation is valid provided the government could reasonably have determined that its interests overall would be served less effectively without the regulation than with it. Ward, 491 U.S. at

801; United States v. Albertini, 472 U.S. 675, 688-89 (1985); Clark v. Community for Creative Non-Violence, 468 U.S. at 296-97.

Ladue's sign ordinance satisfies these requirements because its purpose is to prevent visual blight and other evils caused by a proliferation of signs, regardless of the ideas expressed. As this Court recognized in Vincent, "the substantive evil -- visual blight -- is not merely a possible by-product of the activity, but is created by the medium of expression itself." 466 U.S. at 810. The Ladue sign ordinance, like the state highway beautification laws, is precisely the type of content-neutral regulation permitted by R.A.V., Ward, and Vincent. Based on Vincent, it was "reasonable" for Ladue to enact its sign ordinance to prevent sign proliferation and visual blight in its

community. That Ladue is "underinclusive" or does not ban all signs, is not the criterion on which to judge whether the ordinance discriminates on the basis of content. Instead, this Court should look to the content-neutral purpose to ban the proliferation of signs and promote safety, and determine that Ladue could reasonably have determined that its interests would be served less effectively without the ordinance than with it.

**C. Exceptions for On-Site Signs That Cannot Convey Their Message Via Any Sufficient Alternative Medium Do Not Render a Regulation Content-Based.**

The Ladue ordinance should be read, with its content-neutral purpose in mind, to ban all signs regardless of content except those onsite signs which

constitute a unique mode of expression in that they provide safety and traffic information as well as other identifying information relating to locating a residence, business, school, religious or non-profit organization, historic site or activities, products, or services available at the location.<sup>11</sup> Such information, because

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<sup>11</sup> The majority of Justices on the Metromedia Court (Chief Justice Burger and Justices Brennan, Blackmun, Rehnquist and Stevens) agreed that limited exceptions to a general ban on signs, such as those in the Ladue ordinance, do not alone render an ordinance unconstitutional, finding that the limited exceptions to Metromedia's general ban were too insignificant to rise to the level of content-based discrimination. Metromedia, 453 U.S. at 526 (Brennan, J., concurring, with whom Blackmun, J. joins); *id.* at 553-55 (Stevens, J., dissenting in part); *id.* at 564, 566 (Burger, J., dissenting); *id.* at 570 (Rehnquist, J., dissenting). The excepted categories in Metromedia included government signs; signs at public bus stops; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature and news; approved temporary, off-premises, subdivision directional signs; and temporary political campaign signs. 453 U.S. at 494-95. See also Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 98 (1972)("[T]here may

of its relationship to the specific property and its use, cannot be sufficiently conveyed by any alternative medium of expression other than a sign located on the premises. The Ladue ordinance at issue recognizes that such signs, a specific type of "onsite" or "on-premises" signs, because of their unique capability to reach their intended audience, must be accorded special treatment.<sup>12</sup>

Many courts have upheld similar onsite/offsite sign distinctions as content-neutral restrictions based on an appropriate regulation of the "place" or location of

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be sufficient regulatory interests justifying selective exclusions or distinctions....").

<sup>12</sup> The terms "onsite" and "offsite" do not actually appear in the Ladue ordinance. These terms, however, best convey the general character of the distinctions made in the Ladue ordinance.



speech.<sup>13</sup> Others, like the Eighth Circuit, have held

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<sup>13</sup> See Wheeler v. Commissioner of Highways, 822 F.2d 586, 589-94 (6th Cir. 1987), cert. denied, 484 U.S. 1007 (1988); Messer v. City of Douglasville, 975 F.2d 1505, 1507-11 (11th Cir. 1992); Georgia Outdoor Advertising, Inc. v. City of Waynesville, 833 F.2d 43, 45 (4th Cir. 1987); Rzadkowsky v. Village of Lake Orion, 845 F.2d 653, 654-55 (6th Cir. 1988); Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269, 1272 (4th Cir. 1986), cert. denied, 479 U.S. 1102 (1987); National Advertising Co. v. City of Chicago, 788 F. Supp 994, 997-98 (N.D. Ill. 1991); Burns v. Barrett, 561 A.2d 1378, 1384-85 (Conn.), cert. denied, 493 U.S. 1003 (1989); National Advertising Co. v. Village of Downers Grove, 561 N.E.2d 1300, 1305-08 (Ill. App. 1990), appeal denied, 567 N.E.2d 333 (Ill.), cert. denied, 111 S.Ct. 2917 (1991); Pigg v. State Dept of Highways, 746 P.2d 961, 963-68 (Colo. 1987); Barber v. Municipality of Anchorage, 776 P.2d 1035, 1037 (Alaska), cert. denied, 493 U.S. 922 (1989); Carroll Sign Co., Inc. v. Adams County, 606 A.2d 1250, 1254-55 (Pa. Commw. 1992); City of Lake Wales v. Lamar Advertising Ass'n, 414 So.2d 1030, 1031 (Fla. 1982); State by Spannaus v. Hopf, 323 N.W.2d 746, 753-55 (Minn. 1982); Donrey Communications Co. v. City of Fayetteville, 660 S.W.2d 900, 902 (Ark. 1983), cert. denied, 466 U.S. 959 (1984); see also Chicago Observer, Inc. v. City of Chicago, 929 F.2d 325, 328 (7th Cir. 1991)(off-premises advertisements on newsracks).

Several pre-Metromedia decisions also upheld onsite/offsite distinctions. See United Advertising Corp. v.

that exceptions for onsite signs are unlawful content-based distinctions, at least in the absence of preferential treatment of noncommercial messages.<sup>14</sup> More careful scrutiny of the pertinent statutory provisions of the Ladue ordinance reveal, however, that the exceptions are in fact entirely content-neutral

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Borough of Raritan, 93 A.2d 362, 365 (N.J. 1952); United Advertising Corp. v. Borough of Metuchen, 198 A.2d 447, 450 (N.J. 1964); State v. Lotze, 593 P.2d 811, 814-15 (Wash.), app. dismissed, 444 U.S. 921 (1979); Suffolk Outdoor Advertising Co., Inc. v. Hulse, 373 N.E.2d 263, 265 (N.Y. 1977), appeal dismissed, 439 U.S. 808 (1978); Donnelly Advertising Corp. v. Mayor of Baltimore, 370 A.2d 1127, 1132-33 (Md. 1977).

<sup>14</sup> See National Advertising Co. v. Town of Niagara, 942 F.2d 145, 147 (2d Cir. 1991); Ackerley Communications of Massachusetts, Inc. v. City of Somerville, 878 F.2d 513, 516-17 (1st Cir. 1989); National Advertising Co. v. Town of Babylon, 900 F.2d 551, 556-57 (2d Cir.), cert. denied, 498 U.S. 852 (1990); Metromedia, Inc. v. Mayor & City Council of Baltimore, 538 F. Supp. 1183, 1187 (D. Md. 1982); Fisher v. City of Charleston, 425 S.E.2d 194, 196-99 (W.Va. 1992); Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 433 N.E.2d 198, 200-01 (Ohio 1982).

and should be viewed not as preferring commercial messages over noncommercial messages or some types of noncommercial messages over others, but as excepting only messages uniquely limited to the location and for which there is no sufficient alternative mode of communication other than an onsite sign.

To qualify as an "on-site" sign under this definition, the content of the sign must bear a relationship to the particular location and its use. However, this quality of a connection with the site is not the type of content-based distinction or government favoring of a particular viewpoint which the First Amendment prohibits. Courts have recognized that exceptions for onsite signs are not content-based solely "because the determination of whether a particular sign is allowed at a given location is a function of the

message on the sign itself." National Advertising Co. v. Downers Grove, 561 N.E. 2d 1300, 1307 (Ill. App. 1990), quoting, Wheeler v. Commissioner of Highways, 822 F.2d 586, 591 (1987), cert. denied, 484 U.S. 1007 (1988); State by Spannaus v. Hopf, 323 N.W.2d 746, 753-54 (Minn. 1982). See also Scadron v. City of Des Plaines, 734 F. Supp. 1437, 1447-48 (N.D. Ill. 1990). In Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981), for example, this Court upheld a state fair rule restricting certain types of speech to fixed locations (i.e., fair booths) that had to be rented. In practice, that rule operated as a general ban with an onsite sign exception: the permitted speech was limited to rented locations, and any group wishing to engage in such speech was required to acquire a site at which to do

so. The Court recognized that such a regulation was content-neutral because it discriminated against no viewpoint or subject but merely regulated the location of various activities in an evenhanded manner. *Id.* at 648-49.

The essential neutrality of an "onsite" exception such as that found in the Ladue ordinance is apparent when one considers the "unique nature" of onsite signs. See State by Spannaus v. Hopf, 323 N.W.2d 746, 753 (Minn. 1982). As Justice Brennan wrote in 1952, for the New Jersey Supreme Court, such signs are "in actuality a part of the business itself, just as the structure housing the business is a part of it ...". United Advertising Corp. v. Borough of Raritan, 93 A.2d 362, 365 (N.J. 1952). This Court has recognized that onsite signs may serve uniquely

important functions to property owners. See Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977)(for sale signs for residential homes). Indeed, this Court has long upheld enactments permitting advertisements in a particular location, when they bear a connection to a location or vehicle, but not permitting general purpose advertising. See Packer Corp. v. Utah, 285 U.S. 105, 107 (1932)(rejecting equal protection challenge to ban on cigarette billboards, excepting *inter alia* the premises of any dealer in such products); Railway Express Agency, Inc., v. New York, 336 U.S. 106, 109-10 (1949)(upholding ordinance banning advertisements on vehicles, except for those relating to a business in which the vehicle is engaged).

Regardless of content, an onsite sign such as



that excepted by the Ladue ordinance serves to convey a message uniquely tied to that location and its use, and which cannot be conveyed through any alternative medium. Short of permitting exceptions for such signs, it is difficult to visualize how the particular message could be conveyed to those deemed most important to be reached, *i.e.*, those in the immediate vicinity of the property. A total prohibition on such signs may actually violate the First Amendment by denying the only effective channel of communication to one trying to identify a message linked to specific property and its use. "[A] restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." Vincent, 466 U.S. at 812 (citations omitted). See Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 94-95 (1977).

In contrast, offsite signs -- signs not inherently linked to their site and its use -- may be a significant medium of communication, but they are only one of numerous media that are available to convey the messages they contain. Offsite signs, including "noncommercial" or political ones, such as in this case, are not linked with a specific property site in order to derive their meaning. Therefore, preventing the erection of an offsite sign in a particular location does nothing to suppress a particular message. If a speaker's goal is to deliver a message such as "this is the Miller home," "we sell toys here," or "this property is for sale or rent," there is virtually no other manner to deliver this same message effectively other than by means of an onsite sign. See State v. Lotze, 593 P.2d 811, 814 (Wash.), appeal dismissed, 444

U.S. 921 (1979). On the other hand, any message that can be placed on an offsite sign -- such as "Say No to War in the Persian Gulf, Call Congress Now," as in this case, or "Vote for John Smith," "Buy Millie's Millinery," or "Support Gun Control" -- can be delivered by other alternative means or media.

The distinction drawn by the Ladue ordinance, between messages that must be delivered onsite to be meaningful and offsite messages that can be meaningfully delivered in a myriad of other ways, directly serves the government purpose in restricting the proliferation of signs, because such onsite signs are self-limiting -- by definition, each is confined to a specific location. Conversely, offsite signs -- signs not integrally linked to the property and its use -- are inherently more prone to proliferation. Accordingly,

an otherwise neutral distinction between onsite and offsite signs is well-tailored to combatting the proliferation of signs, which is the stated intent behind the Ladue ordinance.

The Ladue ordinance is a valid time, place and manner restriction in that it is narrowly tailored to suit its intended purposes and leaves open alternative channels of communication for the prohibited speech -- off-site signs. See L. Tribe, American Constitutional Law, §12-23 at p. 982 (2d ed. 1988) (content-neutral restriction is insubstantial and should be upheld if the claimant has the ability to reach the same audience with the same message using alternative channels of communication). The prohibition of off-site signs does not bar the message from reaching its intended audience through other channels of communication.

The same is not true of a ban of onsite signs that the Ladue ordinance and the various highway beautification laws except, *i.e.*, those that identify a person or organization's location or the product or service provided therein, official signs, traffic safety signs, historic or landmark signs.

In other words, offsite signs constitute a particular mode or manner of speech. As such, governments may single them out for restriction as a mode or manner of speech that interferes with the substantial government interest in preventing the visual blight and safety hazards caused by a proliferation of signs. See Metromedia, 453 U.S. at 525-26 (Brennan, J., concurring opinion); *id.* at 545 (Stevens, J., dissenting in part). No Justice in Metromedia disputed that neutral restrictions limited to offsite signs should

be upheld. A distinction between on-site and off-site messages as defined herein simply favors those messages for which there are not sufficient alternative means for expression.

Even if one views the Ladue ordinance as making distinctions between commercial and noncommercial speech and imposing more stringent restrictions on the latter, as the Eighth Circuit erroneously does, the Ladue ordinance should be upheld because government cannot prevent the proliferation of signs if all noncommercial speech is immune from regulation. The effect of such a rule would be to encourage the proliferation of noncommercial signs, which could, at the very least, be placed at any site which might qualify for a sign at all. With such a porous standard, government could



be effectively deprived of the ability to produce any real benefit in terms of reducing the overall number of signs. On the other hand, a ban of all signs significantly interferes with government's ability to ensure the conveyance of on-site identifying and roadside safety information. Thus, application of either extreme of the Eighth Circuit's draconian approach jeopardizes the government's exercise of its general police powers and ability to ensure traffic safety and general order.

## **CONCLUSION**

For the reasons stated, this Court should reverse the decision of the United States Court of Appeals for the Eighth Circuit.

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DEC 13 1993

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

CITY OF LADUE, *et al.*,

v.

MARGARET GILLO,

*Petitioners,*

*Respondent.*

On Writ of Certiorari to the United States  
 Court of Appeals for the Eighth Circuit

**BRIEF AMICI CURIAE OF  
 AMERICAN ADVERTISING FEDERATION,  
 AMERICAN ASSOCIATION OF ADVERTISING  
 AGENCIES, MAGAZINE PUBLISHERS OF AMERICA,  
 AND THE MEDIA INSTITUTE  
 IN SUPPORT OF RESPONDENT**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

No. 92-1856

CITY OF LADUE, *et al.*,  
v. *Petitioners,*

MARGARET GILLES,  
*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Eighth Circuit

**BRIEF AMICI CURIAE OF  
AMERICAN ADVERTISING FEDERATION,  
AMERICAN ASSOCIATION OF ADVERTISING  
AGENCIES, MAGAZINE PUBLISHERS OF AMERICA,  
AND THE MEDIA INSTITUTE  
IN SUPPORT OF RESPONDENT**

The City of Ladue's sign ordinance impermissibly discriminates in favor of certain messages and speakers over other protected communications and is unconstitutional under the First and Fourteenth Amendments to the Constitution of the United States. The decision of the United States Court of Appeals for the Eighth Circuit invalidating the ban should be affirmed.<sup>1</sup>

**INTEREST OF AMICI CURIAE**

*Amici* represent thousands of advertising agencies, advertisers, broadcasters, publishers, and others who participate in the advertising industry nationwide, as well as

<sup>1</sup> Both parties have consented to the participation of *amici* in this case pursuant to Supreme Court Rule 37, as evidenced in letters filed with the Court.

individuals interested in preserving freedom of speech. It is from this broad-based, national perspective that the *amici* present their views to the Court. They have joined in this brief to ensure that the right to disseminate, and the public's right to receive, truthful commercial speech about lawful products and services is protected. *Amici*, who are described below, are:

- The American Advertising Federation ("AAF") is a national trade association representing virtually all elements of the advertising industry. Among AAF's members are companies that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations, and other media. AAF members also include 21 national trade associations; more than 200 local professional advertising associations with 52,000 members; and more than 200 college chapters, with more than 6,000 student members. AAF members use almost all forms of media to advertise and communicate with consumers throughout the United States.
- The American Association of Advertising Agencies ("AAAA"), the national trade association of the advertising agency industry, represents approximately 650 advertising agencies located throughout the United States. Members of the AAAA create and place approximately 80 percent of all national advertisements, as well as significant portions of local and regional advertising. Most clients of AAAA members are businesses selling goods or services to the public. AAAA is dedicated to advancing the interests of the advertising industry and has actively represented its members in connection with governmental efforts to restrict speech.
- The Magazine Publishers of America ("MPA"), the industry association for consumer magazines, has since 1919 represented the interests of magazines distributed in the United States and issued

at least quarterly. MPA's roster includes 205 publishers who produce more than 738 magazines, plus 74 associate members, and 58 international publishing members.

- The Media Institute (the "Institute") is an independent, non-profit research organization that advocates a strong First Amendment. The Institute has participated in select cases in federal circuit courts and the U.S. Supreme Court. In addition, it conducts research projects and sponsors publications relating to the First Amendment and other aspects of the communications media. The advocacy of the Institute here is unrelated to the financial or proprietary interests of any private-party participant.

#### SUMMARY OF ARGUMENT

The City of Ladue's sign ordinance is unconstitutional not because it "favor[s] commercial speech over noncommercial speech," *Gilleo v. City of Ladue*, 986 F.2d 1180, 1184 (8th Cir.), *cert. granted*, 114 S. Ct. 55 (1993), but because it is overtly content-based and unjustifiably favors certain messages by specified speakers over other constitutionally protected communications. Ladue's attempt to characterize Chapter 35 of its city ordinances (hereinafter "the ordinance") as "content-neutral" on the grounds that it is "justified without reference to the content" of the restricted speech must be rejected because: (1) this Court's caselaw makes clear that the so-called "secondary effects" rationale does not excuse a severe limitation on fully protected speech; (2) the "secondary effects" of the signs prohibited by the City are no more harmful than the effects of the signs the City permits; and (3) the effect of an ordinance, and not the reasons used to explain it, should determine whether strict scrutiny is appropriate. Only such an "objective" approach can avoid inquiries into the legislative motivation and legislative history that would be necessary to gauge the government's true intentions when adopting a measure that limits speech. In any event, whether assessed under strict

or immediate scrutiny, Ladue's ordinance fails because the City could have easily accomplished its objectives by adopting numerous less restrictive regulations.

Ladue's ordinance recognized that commercial activity within its borders necessitated certain commercial messages. It also sought to accommodate the rule of *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), which prohibits limitations on for-sale signs. In the process, the City has run headlong into the Court's commercial speech doctrine, which accords commercial speech a lower level of constitutional protection than non-commercial speech. That doctrine can be construed—as the lower courts here held—to render constitutionally problematic any ordinance that seeks to place commercial messages on a different or equal (but not clearly lower) plane. Such an outcome hamstring municipalities. The Court can escape these difficulties by making clear that commercial speech and noncommercial speech should be accorded the same measure of constitutional protection. Such a rule would be consistent with the original understanding of the First Amendment, which extended to commercial speech as well as core political speech, and the results of this Court's caselaw. It would also avoid having government officials make the delicate and content-based judgments needed to define the limits of commercial and noncommercial messages. Most importantly, equalizing the level of protection of commercial and noncommercial speech would enable cities to adopt sign ordinances that balance the rights of commercial and non-commercial speakers, as well as the interests of the government in avoiding visual blight.

## ARGUMENT

### I. THE CITY'S CONTENT-BASED ORDINANCE CANNOT WITHSTAND STRICT SCRUTINY.

The ordinance at issue in this case is unquestionably content-based in its effect. Although it authorizes "for sale" or "for lease" signs on residential property, it otherwise prohibits residents from displaying all but small identification signs on their property. In contrast, churches,

schools, and commercial establishments, among others, are permitted to erect signs that inform the public about the activities on their premises. Even these organizations, however, are prohibited from displaying signs dealing with other topics. Furthermore, Ladue dictates in considerable detail what may and may not be said on the signs it does allow. Such an obviously content-based ordinance is unconstitutional unless it serves a compelling state interest by the least restrictive means and leaves open alternative channels of communication.

Ladue defends its ordinance as content-neutral because it is said to be "justified without reference to the content" of the signs. This rationale is inapplicable where, as here, the government discriminates against some fully protected communications in favor of other such messages. It is also irrelevant to this case because the signs banned by the City would cause no more "visual blight" than the signs that are allowed. Most important, however, this Court should make clear that the effect of a law, and not the legislature's intentions in adopting it, determines whether a law is content-based and therefore subject to strict scrutiny.

#### A. The City of Ladue's Ordinance is Overtly Content-Based.

Unless they serve a compelling state interest, regulations of speech based on content are prohibited. *See, e.g., Burson v. Freeman*, 112 S. Ct. 1846, 1855 (1992) (plurality opinion) ("[D]istinguishing among types of speech requires that the statute be subjected to strict scrutiny."). The City's ban on all signs, subject to some exceptions, is content-based for at least two reasons. First, it excepts certain messages by selected speakers, thus creating distinctions on the basis of subject matter. Second, the ordinance dictates the content of specified permitted signs. Thus, "by any commonsense understanding of the term, the [ordinance] in this case is 'content-based.'" *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516-17 (1993).



**1. The exceptions to the bar on signs discriminate based on the speaker and message.**

Like the statute invalidated in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978), Ladue's ordinance regulates "the subjects about which persons may speak and the speakers who may address a public issue." The ordinance does so by excepting from the ban not only traffic and safety-related signs, but also (1) signs identifying residences and subdivisions; (2) identification signs and bulletin board-type signs for churches, religious institutions, schools, and other not-for-profit institutions; (3) real estate rental or for-sale signs; and (4) specified signs on commercial establishments. City of Ladue Petition for Certiorari App. 40a-45a. These distinctions are content-based in that they, for example, permit a resident to post a for-sale sign in front of her house but not a sign that says "Peace in the Gulf" or "Welcome Home, Joe." They amount to a choice by the City as to the "appropriate subjects for public discourse." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514 (1981). As such, they warrant strict scrutiny. *Id.*

The City's ordinance should also be subject to strict scrutiny because it favors certain messages communicated by particular speakers over the speech of others. Permitting religious institutions and commercial establishments to post information about their activities while denying that same right to Ladue residents is plainly problematic. *Minneapolis Star of Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) ("[D]ifferential treatment . . . suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional").<sup>2</sup> Absent a compelling reason, the government may not determine that a church's notice of its presence and the time of its worship services is more valuable "speech" than an

<sup>2</sup> See also, e.g., *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991) ("The Government's power to impose content-based [burdens] on speech surely does not vary with the identity of the speaker.").

individual's views about the Gulf War. Allowing the former and prohibiting the latter is unquestionably content-based.

**2. The ordinance dictates the content of the signs it does permit.**

This Court has often said that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). Ladue's ordinance does precisely that. The signs tolerated by the City are not limited to those needed for identification, health, or safety. Ladue allows churches and schools to erect bulletin board-type signs and commercial establishments to place message-bearing signs<sup>3</sup> in their windows. However, the City then seeks to control what those entities may say on such signs. Section 35-5 limits church "bulletin boards" "to announcements relating to the name of such church, . . . its services, activities, or other functions." Ladue Pet. Cert. App. 41a (emphasis added). Signs in the windows of commercial establishments may inform the public about activities conducted on the premises. Brief of Petitioner at 28; Ladue Pet. Cert. App. 38a, 42-43a (quoting Sections 35-1, 35-7). Thus, a church's bulletin board may say "Church Bazaar Sunday," but it may not state "Free South Africa" or proclaim that "The Bible Values Life: Don't Drink and Drive." A sign in a commercial establishment may say "Clearance Sale," but may not say "Save Our Jobs: No On NAFTA." Whatever else may be said about such distinctions, they are undeniably content-based.<sup>4</sup>

<sup>3</sup> By "message-bearing signs," amici are referring to signs—either commercial or noncommercial—used for purposes other than identification.

<sup>4</sup> Similarly, the Ladue ordinance dictates the contents of for-sale and for-lease signs. Section 35-10 provides that such signs "may only state: (a) that the property is for sale, lease or exchange by the owner or his agent; (b) the owner's or agent's name; and (c) the owner's or agent's address or telephone number." Ladue Pet. Cert. App. 45a. Adding the phrase "Eager to Sell" would, thus, presumably render the signs impermissible.

Once the City has made a determination to allow a church to erect a bulletin board or a resident to post a for-sale type sign of designated sizes, it may not dictate the contents of those signs. For *Ladue* to ensure that its rules have been complied with, "enforcement authorities must necessarily examine the content of the message that is conveyed." *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 230 (1987) (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984)). But such "official scrutiny of the content of [a message]" is "entirely incompatible with" First Amendment guarantees. *Arkansas Writers*, 481 U.S. at 230.

Under any definition of the term, the City's ordinance is "content-based." Accordingly, strict scrutiny is warranted.

**B. The City of Ladue Cannot Evade the Content-Based Nature of the Ordinance By Contending That It is "Justified Without Reference to the Content" of the Restricted Speech**

*Ladue* does not defend its ordinance as content-neutral in effect. Nor could it. Instead, it seeks refuge in this Court's occasional suggestion that certain laws should be treated as content-based if the justifications advanced for them are not tied to the subject matter or viewpoint of the restricted speech. This argument fails for three reasons. First, this Court has never employed the so-called "secondary effects" rationale<sup>5</sup> to uphold a restriction that favored one fully protected message over another equally protected message. Second, as this Court made clear in *Discovery Network*, 113 S. Ct. at 1514-15, a regulation may not turn on content where the effects associated with the speech are irrelevant to the message. Put another way, a for-sale sign and a political sign of like size both arguably create "visual blight." Distinguishing between

<sup>5</sup> *Amici* follow the practice of the Court in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2546 (1992), and refer herein to the notion that an ordinance is content-neutral if it is "justified without reference to the content" of the restricted speech as the "secondary effects" rationale.

the two is a suspect content-based distinction. Finally, this Court should make clear that the operation of a regulation, not the purported justification for it, determines the level of scrutiny accorded a restriction on communication.

**1. The "secondary effects" rationale is inapplicable here.**

*Ladue's* entire argument depends on its contention that this overtly content-based ordinance is content-neutral because it is "justified without reference to the content" of the messages contained on the signs. *See, e.g.*, Pet. Brief at 34-35. Its contention fails because the "secondary effects" rationale is inapplicable here. That rationale may be "a valid basis for according differential treatment to . . . a content-defined subclass of proscribable speech." *R.A.V.*, 112 S. Ct. at 2546 (emphasis added). This case, however, does not involve such "proscribable speech." As the *R.A.V.* court recognized, "the prohibition against content discrimination . . . applies differently in the context of proscribable speech than in the area of fully protected speech," *id.* at 2545, which is at issue here.

The City's ordinance makes illegitimate distinctions between categories of fully protected speech. It permits notices of church activities but forbids Ms. Gilleo from expressing her political opinions—or a notice of an Alcoholics Anonymous meeting at her house. A for-sale sign is allowed if its contents strictly conform with the ordinance, but not if it adds a word or a phrase. Such content-based distinctions are prohibited absent a compelling justification because this type of discrimination "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace," *Simon & Schuster*, 112 S. Ct. at 508, if only because severe restrictions on communication inevitably reinforce the status quo.<sup>6</sup>

<sup>6</sup> In addition, the "secondary effects" the *Ladue* ordinance seeks to avoid are not the type the Court has relied on in lowering the scrutiny of restrictions on speech. As the Court made clear in *Boos v. Barry*, 485 U.S. 312, 321 (1988), "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in



Thus, under this Court's caselaw, the "secondary effects" rationale cannot be employed to lessen the level of scrutiny accorded this manifestly content-based ordinance.

**2. A regulation cannot be justified as preventing "secondary effects" where the permitted communications create the same effects as those that are barred.**

In *Discovery Network*, 113 S. Ct. at 1511, the City of Cincinnati contended that its bar on the distribution of commercial newspapers via newsracks was justified by its interests in "safety and esthetics." "[B]ecause every decrease in the number of such dispensing devices necessarily effects an increase in the safety and improvement of the cityscape," the City maintained that its prohibition was "entirely related to its legitimate interests in safety and esthetics." *Id.* This Court rejected the City's claim, believing it "an insufficient justification for the discrimination against respondents' use of newsracks *that are no more harmful than the permitted newsracks.*" *Id.* (emphasis added).

Similarly, as the Eighth Circuit found, "Ladue has not shown that the prohibited signs cause more aesthetic, safety, and property value problems than the permitted signs." 986 F.2d at 1183. To illustrate, the esthetic effect on the City of Ladue is the same whether a sign in front of the church declares "Jesus Saves" or "Bazaar Next Saturday." The City's discrimination in favor of certain signs and messages thus "does not correlate with Ladue's interest in eliminating the secondary effects" it purportedly fears. *Id.* This "undermines Ladue's com-

*Renton.*" Here, the only "secondary effect" of the speech about which the City of Ladue is concerned is the emotional state of those who see the signs and are, presumably, less happy because of the "visual blight" they are forced to endure. *Id.* The psychological effect of a sign is a far cry from the increase in crime, prostitution, decrease in property values, destruction of residential neighborhoods, and the other "secondary effects" identified in cases like *Renton v. Playtimes Theaters, Inc.*, 475 U.S. 41 (1986), and *Barnes v. Glen Theater, Inc.*, 111 S. Ct. 2456 (1991).

mitment to its secondary-effects justification and supports the contention that the ordinance is aimed at the content of the signs." *Id.*

As was the case in *Carey v. Brown*, 447 U.S. 457, 465 (1980), nothing in the content-based distinctions drawn by the City "has any bearing whatsoever on" visual blight. See also *Discovery Network*, 113 S. Ct. at 1514 ("[T]he distinction bears no relationship *whatsoever* to the particular interests that the City has asserted."); cf. *Simon & Schuster*, 112 S. Ct. at 510. Although Petitioners strain mightily to characterize certain signs as prone to proliferation, this is simply a pretext for permitting signs the City deems vital and restricting those it considers unimportant. This Court has repeatedly held that regulations that rely unnecessarily on content-based distinctions must be closely scrutinized. Accordingly, strict scrutiny is appropriate here.<sup>7</sup>

**3. Assessing regulations on speech objectively would avoid inappropriate inquiries into legislative motives.**

Petitioners' contention that the intentions of lawmakers should define the level of scrutiny invites difficult inquiries into legislative motivation and legislative history. The Court should reject this invitation and make clear that the actual effect of a regulation determines whether it is content-based—not the justifications advanced for it.

The City in effect contends that, absent a demonstrably evil intention on its part, any restriction it imposes on speech, no matter how severe, must be tested against the more deferential standard applied to content-neutral restrictions. Taken to its logical conclusion, the City's argument would "undermine the very foundation of the

<sup>7</sup> Nor can the City of Ladue defend the ordinance as content-neutral merely because it is arguably not viewpoint-based. See, e.g., *Boos*, 485 U.S. at 318-319 (finding that a statute was content-based, but not viewpoint-based); *Burson*, 112 S. Ct. at 1850 ("This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic.").



content-based/content-neutral distinction." Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 116-17 (1987). It would all but eliminate strict scrutiny for restrictions on speech, as legislatures concoct multiple "content-neutral" reasons to mask their true agendas.

Acceptance of the City's argument would essentially force putative speakers to show that the legislature subjectively intended to censor speech. Yet this Court has "consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" *Simon & Schuster*, 112 S. Ct. at 509 (quoting *Minneapolis Star*, 460 U.S. at 592). To prevail, Ms. Gilleo should not be forced to show "evidence of an improper censorial motive." *Arkansas Writers*, 481 U.S. at 228.

Adopting the City's position would have dire implications for free speech. Where legislators set forth content-neutral reasons for content-based restrictions on speech, as Ladue seeks to do here, the only way for the courts to police against government attempts to disguise such limits as content-neutral would be to examine the subjective motivations of the legislators, an enterprise this Court has eschewed in a variety of other contexts.<sup>8</sup> As Justice Scalia recently observed, "[w]e are governed by laws, not by the intentions of legislators." *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1567 (1993) (Scalia, J., concurring).

To illustrate, assume that an unpopular municipal administration is the subject of numerous newspaper attacks. In an attempt to diminish the circulation of these hostile newspapers, the city council bars the distribution

<sup>8</sup> See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810) ("It may well be doubted, how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice."); *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment.").

via newsracks of newspapers that address municipal issues. The council contends that such newspapers are more popular than others, which leads to a greater number of unattractive newsracks and an increased likelihood of litter. This justification is set forth in the statute, together with statistics demonstrating that newspapers addressing municipal issues are in fact more popular and therefore give rise to a large percentage of the city's litter. Would such a regulation be constitutional? If so, the government will almost always be able to achieve its censorial ends by designing a class that includes the speakers it is seeking to shut down, and manufacturing content-neutral justifications for its classification. How would the Court guard against such a tactic, other than by examining the subjective intentions of the legislators? Yet this Court has properly recognized that "determining the subjective intent of legislators is a perilous enterprise." *Edwards v. Aguillard*, 482 U.S. 578, 638 (1987) (Scalia, J., dissenting); see *supra* note 8.

Legislation is often "the product of multiple and somewhat inconsistent purposes that led to certain compromises." *United States R.R. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring). Certainly the subjective motivation of legislators may not be divined without extensive reliance on legislative history. See *Edwards*, 482 U.S. at 636 (Scalia J., dissenting) (describing the difficulties of such an analysis). In addition, "undue emphasis on actual motivation may result in identically worded statutes being held valid in one State and invalid in a neighboring State." *Fritz*, 449 U.S. at 180.

Subjecting all regulations that turn on content-based distinctions to strict scrutiny has the advantage of avoiding any inquiry into legislative purpose, objective or subjective. Such an approach recognizes that "the best protection against governmental attempts to squelch opposition has never lain in [the Court's] ability to assess the purity of legislative motive but rather in the requirement that the government act through content-neutral means that restrict expression the government favors as well as

expression it disfavors." *Boos*, 485 U.S. at 336-337 (Brennan, J., concurring).<sup>9</sup>

"[E]ven regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star*, 460 U.S. at 592. Expressly content-based restrictions—whatever their justification—distort public debate in a content-differential manner and pose an especially high risk of improper motivation. *Stone*, *supra*, at 116. Particularly when dealing with high-value speech, this Court ought to examine the operation of a restriction on speech instead of the justifications advanced therefor. Under that test, *LaDue's* ordinance is unquestionably subject to strict scrutiny.<sup>10</sup>

### C. The City's Ordinance Cannot Survive Strict Scrutiny.

"Content-based regulations are presumptively invalid." *R.A.V.*, 112 S. Ct. at 2542. A content-based regulation can only survive if the government "show[s] that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster, Inc.*, 112 S. Ct. at 509 (quoting *Arkansas Writers*, 481 U.S. at 231). A law that is subject to strict

<sup>9</sup> See also *Burson*, 112 S. Ct. at 1858-59 (Kennedy, J., concurring) ("Discerning the justification for a restriction of expression is not always . . . straightforward . . . . In some cases, a censorial justification will not be apparent from the face of a regulation which draws distinctions based on content, and the government will tender a plausible justification unrelated to the suppression of speech or ideas.").

<sup>10</sup> At a minimum, the Court should clarify that the objective purpose of a statute is controlling, not the subjective motivations of the legislators or the post hoc rationalizations of government litigators. "For while it is possible to discern the objective 'purpose' of a statute (i.e., the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth . . . , discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task." *Edwards*, 482 U.S. at 636 (Scalia, J., dissenting).

scrutiny "rarely survives such scrutiny." *Burson*, 112 S. Ct. at 1852.

In this case, although the City's interest in combatting visual blight may be substantial, it is far from compelling. This case is not like *Burson*, where the Court was presented with the "particularly difficult reconciliation" of balancing "the accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy." *Id.* at 1851. Unlike the right to vote, there is no constitutional right to live in a totally sign-free neighborhood. The ordinance therefore does not vindicate a "compelling interest."

On the other hand, there is a constitutional right to speak. At least two free speech interests are at issue here—that of the homeowner and those of the readers. The right to use one's property for communicative purposes lies at the heart of the First Amendment. A homeowner's interest in communicating a message from his or her own property is a deeply felt and vital one, for which there are few substitutes. See *City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 811 (1984) (recognizing "[t]he private citizen's interest in controlling the use of his own property"). In fact, this Court has often held that the government may not compel property owners to devote their property to messages with which they disagree.<sup>11</sup>

Moreover, the interests of recipients of the information are also substantial, particularly with respect to for-sale signs. *Linmark*, 431 U.S. 85.<sup>12</sup> Although the interests of

<sup>11</sup> *Miami Herald v. Tornillo*, 418 U.S. 241 (1974) (publisher has right to use its own newspaper space as it sees fit); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (citizens may not be required to "use their private property as . . . a 'mobile billboard' for the State's ideological message").

<sup>12</sup> See also *Kleindepnst v. Mandel*, 408 U.S. 753, 762-63 (1977) (recognizing the right to "receive information and ideas"); *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("[T]he right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if



the homeowner and the listener do not completely override all other interests, the government's interests in esthetics is not compelling when measured against the First Amendment interests in disseminating and receiving speech.

The City has also utterly failed to demonstrate the existence of any problem that would necessitate the regulation. "[T]he danger of censorship presented by a facially content-based statute requires that that weapon be employed only where it is *necessary* to serve the asserted compelling interest." *R.A.V.*, 112 S. Ct. at 2549 (internal quotation marks, citations, and brackets omitted) (emphasis in original). Certainly Ms. Gilleo's small, single sign does not present a serious threat to the beauty of Ladue. Moreover, as this Court noted in *Vincent*, "private property owners' esthetic concerns will keep the posting of signs on their property within reasonable bounds." 466 U.S. at 811.<sup>13</sup> Because the City could plainly have promoted its interests through other, less restrictive means than a total ban on signs, its ordinance is unconstitutional.

In addition, the numerous, less-restrictive content-neutral alternatives available to the City that still would accomplish its goal would cause this restriction to fail even intermediate scrutiny. See *Discovery Network*, 113 S. Ct. at 1510 n.13 ("[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between the ends and means is reasonable.").<sup>14</sup> As such, it is unquestionably unconstitutional under strict scrutiny.

otherwise willing addresses are not free to receive and consider them.").

<sup>13</sup> Although the City argues that the aggregate effect of signs displayed in homeowners' windows would create "visual blight," it fails to show that most or even many homeowners would place signs in their windows or on their lawns.

<sup>14</sup> For example, a rule limiting the number and size of signs per home or establishment would be permissibly content-neutral. A

Finally, the restriction does not leave open "ample alternative channels for communication." *Linmark*, 431 U.S. at 93. As noted, the ability to communicate a message from one's own property is a vital one. There is no substitute for an on-site sign to identify a commercial establishment, a house for sale, or the activities of a church.<sup>15</sup> Nor were there many practical alternatives for Ms. Gilleo's message.<sup>16</sup>

In sum, the Ladue ordinance fails to meet any part of the strict scrutiny test applicable to content-based regulations. Accordingly, it should be invalidated as unconstitutional.

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first-come, first-served restriction limiting the total number of signs permissible in any subdivision could also satisfy the City's esthetic concerns without a content-based restriction. Similarly, limiting the amount of time a sign could be displayed might limit the proliferation of signs. See *Opposition of Respondent to Petition for Certiorari* at 9.

<sup>15</sup> See *Metromedia*, 453 U.S. at 516 ("Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate, and prohibitively expensive." (quoting Joint Stipulation of Facts)); *Linmark*, 431 U.S. at 93 (media other than signs "may be less effective . . . for communicating the message that is conveyed . . . . The alternatives, then, are far from satisfactory.").

<sup>16</sup> Indeed, the ordinance's bar on all signs amounts to a complete proscription on a mode of communication. Such bans pose significant dangers to the freedom of speech. "[S]omething is lost in transition" when a speaker is denied the ability to speak in his or her preferred medium. Stone, *supra*, at 65. Certain means of communication may be "used disproportionately by certain types of speakers or by speakers associated with particular points of view." *Id.* at 66. Foreclosing that mode can harm the proponents of one viewpoint over others. Moreover, a sign is an inexpensive and easy mode of communication. Were Ms. Gilleo required to purchase time on a radio or television station or an ad in a newspaper to express her views, she might well stay silent.



## II. ~~TRUTHFUL~~ MESSAGES ABOUT LAWFUL PRODUCTS AND SERVICES SHOULD BE ACCORDED FULL FIRST AMENDMENT PROTECTION.

Ladue excepted certain commercial communications from its ban because it recognized that a total ban on commercial signs would essentially exile from within its borders all entities offering goods or services for sale to the public. Commercial activity is basically impossible if a seller is unable to advertise on-site, at a minimum, its presence and what is offered on the premises. Yielding to this fact of life, the City made the eminently reasonable determination that all commercial signs could not be banned. Arguably, this judgment was constitutionally compelled by this Court's decision in *Linmark*, at least with respect to for-sale and for-lease signs.

Yet, so long as the Court adheres to its rule that commercial speech should be accorded a lower level of constitutional protection than noncommercial speech, any determination by a city seeking to restrict residential signs while preserving commercial activity will inevitably—and apparently impermissibly—“favor[] commercial speech over noncommercial speech.” 986 F.2d at 1184. The only way to accommodate fully the compelling needs of municipalities for commercial activity, and of commercial actors to advertise, is for the law to treat commercial speech and noncommercial speech equally.

To be clear, *amici* do not suggest that commercial speech in general is somehow more important, or deserving of more protection, than political speech—which lies at the heart of the First Amendment. *Amici* maintain, however, that there are occasionally compelling needs for commercial messages, and that fully accommodating those interests may be doctrinally feasible only if commercial and noncommercial speech are accorded the same constitutional protections. If commercial messages continue to be considered “lower value” speech, then any attempt by the government to allow commercial speech where noncommercial speech is restricted will almost inevitably be considered unconstitutional. A rule according com-

mercial and noncommercial messages equal treatment would avoid the numerous other doctrinal difficulties created by the Court's current commercial speech jurisprudence and be consistent with the original understanding of the First Amendment, as well as the results of most of this Court's cases.

### A. According Full Constitutional Protection to Truthful Commercial Speech Would Avoid the Otherwise Inevitable Dilemmas Created by Municipal Regulation of Signs.

As this case illustrates, according diminished constitutional protection to commercial speech creates severe doctrinal difficulties. Only by treating commercial and noncommercial communications equally can this Court avoid such problems, enable municipal governments to enact reasonable limits on signs, and still protect the constitutional rights of speakers and listeners alike.

A municipality that contains within it both commercial and residential areas has five basic alternatives in seeking to restrict signs. It can: (1) prohibit all signs, (2) allow all signs without restriction, (3) favor noncommercial signs over commercial signs, (4) favor commercial signs over noncommercial signs, or (5) allow equal access to commercial as well as noncommercial signs. Each of these alternatives, except the last, is either impractical or constitutionally problematic. Accordingly, this Court should make clear that, absent compelling reasons for differential treatment, commercial and noncommercial signs should be treated alike.

1. *Barring all signs.* Barring all signs is impossible as a practical and, arguably, as a legal matter. At a minimum, traffic signs are necessary. Other signs, such as public safety signs and hospital identification signs, serve compelling state interests. In addition, as noted, certain commercial signs must be tolerated if a city wishes to have commercial activity within its environs. This Court has recognized that advertising signs serve vital interests. See *Linmark*, 431 U.S. 85.

2. *No limit on signs.* Conversely, preventing municipalities from placing any limits on the signs that may be displayed on one's own property may well accord insufficient leeway to a municipality concerned about "visual blight."

3. *Favoring noncommercial signs over commercial ones.* Permitting a municipality to bar all commercial signs, for example, but requiring it to allow noncommercial signs forces government officials to make difficult and dangerous content-based determinations as to what is and is not commercial. *Discovery Network*, 113 S. Ct. at 1514 n.19 ("[T]he responsibility for distinguishing between [commercial and noncommercial speech] carries with it the potential for invidious discrimination of disfavored subjects."). Such an outcome would also accord insufficient respect to the needs of commercial speakers to communicate, and of listeners to receive, valuable information. And an ordinance of this type might well be inconsistent with the rule of *Linmark*. Finally, as noted above, commercial signs are frequently necessary to the existence of commercial activity.

4. *Favoring commercial signs over noncommercial ones.* As the Eighth Circuit recognized, under current doctrine, this option is constitutionally problematic because it elevates so-called "lower value" speech over "higher value" messages. *See, e.g., Metromedia*, 453 U.S. at 513 ("[T]he city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages."). Moreover, it requires delicate content-based judgments that are inappropriate for government officials. *Discovery Network*, 113 S. Ct. at 1513 and n.19.

On occasion, however, it may be that a governmental entity can adduce compelling reasons for permitting commercial signs but not noncommercial ones, or for allowing institutions, but not residences, to display on-site

signs.<sup>17</sup> This should be permissible, but such a result would be doctrinally problematic unless this Court were to determine that commercial and noncommercial speech should be treated equally. Failure by the Court to adopt such a rule would, thus, undermine every attempt by a municipality to accommodate the needs of commercial speakers and to limit signs to the extent possible. Adherence to a lower level of protection for commercial speech would also continue to make it difficult for the government to permit institutions that need to communicate with the public to fulfill their functions—such as hospitals, churches, non-profit institutions, and commercial establishments—to have on-site signs and at the same time prevent residences from displaying signs as well. If the Court fails to equalize the treatment of commercial and noncommercial speech, ordinances of this type will almost inevitably be struck down by lower courts on the grounds that they "favor[] commercial speech over noncommercial speech." 986 F.2d at 1184.

5. *According equal treatment to commercial and non-commercial signs.* *Amici* urge the Court to adopt a rule of equal treatment for commercial and noncommercial speech. Such a rule would preserve this Court's decision in *Linmark*, avoid elevating commercial over noncommercial speech, accommodate the interests of commercial and noncommercial speakers, and permit the City a great deal of control over "visual blight." This rule thus permits reconsideration of potential doctrinal difficulties. As demonstrated below, it is also consistent with the original understanding of the First Amendment, the outcome of most of this Court's cases, and common sense.

<sup>17</sup> To illustrate, the historic city of Charleston, South Carolina might well determine that stores need signs in order to attract customers, but could demonstrate a compelling interest in barring all residential signs. *Cf. Metromedia*, 453 U.S. at 534 (Brennan, J., concurring); *see supra* pp. 18-19.



**B. The Original Understanding of the First Amendment Was That Truthful Commercial Messages Are Fully Protected.**

The generation of the Framers accorded property rights the same status as other liberties.<sup>18</sup> The Framers accepted the vital importance of freedom of expression and its inextricable link with property rights, which Cato had articulated as follows: "This sacred Privilege is so essential to free Government that the Security of Property, and the Freedom of Speech, always go together." John Trenchard & Thomas Gordon, 1 *Cato's Letters* 95-103 (1733) (Essay No. 15, Of Freedom of Speech: That the Same is Inseparable From Publick Liberty (Feb. 4, 1720)).<sup>19</sup> Given their outlook, the current distinction between so-called "commercial speech" and speech about other matters would never have occurred to the Framers. Their practical concern for business and property was mirrored in the vibrant colonial press. The standard colonial newspaper was almost half-filled with local advertising.<sup>20</sup> Interest in advertising was intense,<sup>21</sup> and, for

<sup>18</sup> For example, George Mason's Virginia Declaration of Rights stated that the purpose of the Revolution was to secure "the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing Happiness and Safety." Va. Declaration of Rights, art. 1 reprinted in Helen H. Miller, *George Mason: Gentleman Revolutionary* 340 (1975) (emphasis added). As James Madison put it, "[w]here an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions." James Madison, Papers, March 29, 1792, reprinted in 1 *The Founders' Constitution* 598 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>19</sup> Cato's articulation of the tie between property rights and free speech was enormously influential in colonial America. Jeffery A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 25 (1988).

<sup>20</sup> Lawrence C. Wroth, *The Colonial Printer* 234 (1938). To illustrate, in 1766, Hugh Gain's *New York Mercury* was seventy percent advertising, and fifty-five percent of the *Royal Gazette* was commercial matter. Alfred M. Lee, *The Daily Newspaper in America* 32 (1937).

<sup>21</sup> During the colonial era, "[a]dvertisements had as much interest as the news columns, perhaps greater interest . . . . Arrival of a

much of that era, newspapers did not differentiate commercial and editorial material by layout or typeface.<sup>22</sup>

The full integration of editorial and commercial matters in the press reflected the colonial view that the benefits of freedom of expression extended to the entire spectrum of human endeavors. Thus, the Continental Congress urged settlers in Quebec to recognize that a free press was crucial to "the advancement of truth, science, morality, and arts in general." Address to the Inhabitants of Quebec (1774), reprinted in Bernard Schwartz, 1 *The Bill of Rights: A Documentary History* 223 (1971). This view encompassed commercial communications as well. For example, Richard Henry Lee of Virginia—perhaps the leading Anti-Federalist—said in his demand for a bill of rights that "a free press is the channel of communication to mercantile and public affairs."<sup>23</sup>

new cargo . . . likely was what the man, home from a reading at the coffee house or tavern, talked about at his fireside rather than the reception of a new envoy at some court in Europe." Frank Presbrey, *The History and Development of Advertising* 154 (1929). See also *Discovery Network*, 113 S. Ct. at 1512-13 n.17 (quoting Revolutionary-era printer Isaiah Thomas).

<sup>22</sup> Kent R. Middleton, *Commercial Speech in the Eighteenth Century*, printed in *Newsletters to Newspapers: Eighteenth-Century Journalism* 281 (Donovan H. Bond & W. Reynolds McLeod eds., 1977).

<sup>23</sup> Letter XVI, January 20, 1788, in *An Additional Number of Letters from the Federal Farmer to the Republican* 151-53 (1962) (emphasis added), reprinted in *Freedom of the Press from Zenger to Jefferson: Early American Libertarian Theories* 144 (Leonard Levy ed., 1966). The twin concepts of freedom of speech and of the press were considered as two sides of the same coin, serving the same purposes, and were often referred to interchangeably. See, e.g., Leonard Levy, *Legacy of Suppression* 174 (1960) ("[F]reedom of speech and freedom of the press, being subject to the same restraints of subsequent punishment were rarely distinguished. Most writers, including Addison, Cato, and Alexander, who employed the term 'freedom of speech' with great frequency, used it synonymously with freedom of the press."). Thus, this Court has always treated the freedom of speech and press as coterminous. See, e.g., *Bellotti*, 435 U.S. at 781-83.



Given the prevalence and importance of commercial messages in colonial America, it is not surprising that the very idea of "the freedom of speech, or of the press" evolved in close connection with the development of advertising. In fact, one of the best-known statements in defense of the freedom of expression was written in response to an attack on a commercial message printed by Benjamin Franklin. In 1731, Franklin printed an advertising handbill for a ship's captain, who sought additional freight and passengers for his ship. At the bottom of the ad was the note, "No Sea Hens nor Black Gowns will be admitted on any Terms." *An Apology for Printers*, Pa. Gazette, June 10, 1731, reprinted in 2 *Writings of Benjamin Franklin* 172, 176 (1907).

This handbill prompted criticism from the local clergy (the "Black Gowns"), although it is unclear whether they were more offended by their exclusion from the pool of desirable passengers or from their placement in the same category as women of ill repute ("Sea Hens"). In response, Franklin published his *Apology for Printers* which is considered "[b]y far the best known and most sustained colonial argument for an impartial press." Stephen Botein, *Printers and the American Revolution*, printed in *The Press and the American Revolution* 20 (Bernard Bailyn & John B. Hench eds., 1980). Franklin's *Apology* contended that "Printers are educated in the Belief that when Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick." *An Apology for Printers*, *supra*.<sup>24</sup> Thus, America's first sustained defense of freedom of expression, and of the very notion of a "marketplace of ideas," came in response to an attack on commercial speech.<sup>25</sup>

<sup>24</sup> This echoed the sentiment in the libertarian *Cato's Letters* that "Whilst all Opinions are equally indulged, and all Parties equally allowed to speak their Minds, the Truth will come out." Trenchard & Gordon, 3 *Cato's Letters* 295 (1733).

<sup>25</sup> In addition, one of the major precipitating events of the American Revolution also involved a defense of commercial messages. The Stamp Act of 1765 taxed each newspaper—and imposed an additional

The First Amendment came from this background. Its authors were accustomed to the idea that commercial speech had important practical value. Their regard for free expression had been critically shaped by the ideas embodied in Franklin's defense of a commercial handbill. Thus, the First Amendment's categorical protection for freedom of expression must be understood to have meant what it said: full protection extends to truthful commercial discourse.<sup>26</sup>

### C. The Results of This Court's Commercial Speech Decisions Generally Have Protected Truthful Commercial Messages.

Granting equal protection to commercial speech is not inconsistent with this Court's jurisprudence. Since *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, this Court has recognized that "the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system" and to "the formation of intelligent decisions as to how that system ought to be regulated." 425 U.S. 748, 765 (1976).

two-shilling tax on each advertisement. "This was a heavy tax in proportion to the value of the item being taxed," and galvanized the colonial press against the British government. John Lofton, *The Press as Guardian of the First Amendment* 2 (1980). The opposition of newspapers to the Stamp Act of 1765 was in large part, if not primarily, based on their concern that it encroached on the freedom of expression. Arthur M. Schlesinger, *Prelude to Independence: The Newspaper War on Britain 1764-1776* 70-82 (1966).

<sup>26</sup> Of course, the government may ban the dissemination of false or misleading commercial messages. See, e.g., *Friedman v. Rogers*, 440 U.S. 1 (1979). This may be true either because, by definition, such messages are excluded from the First Amendment or because the government is always presumed to have a compelling interest in preventing deception. In any event, such a view comports with the original understanding of the First Amendment, which was adopted against the background of a venerable common-law tradition prohibiting commercial misrepresentation. See William Blackstone, 3 *Commentaries on the Laws of England* 431 (1768); Joseph Story, *Equity Jurisprudence* § 191 (1836); William F. Walsh, *A History of Anglo-American Law* 328-29 (1932) (tracing development of action of deceit from mid-fourteenth century).

Moreover, the decision observed that "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.

Although the Court has said that commercial speech is entitled to less protection than noncommercial speech and has applied the "balancing" test established in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), it has, in almost every case, decided its cases in a manner consistent with a grant of full First Amendment protection to truthful advertising of lawful products. This Court's commercial speech decisions have generally upheld restrictions only where consumers were likely to be misled in the absence of regulation, or where illegal or relatively unique products or services were being advertised.<sup>27</sup> On the other hand, the Court has struck down numerous regulations on commercial communications which were designed to advance other purported government interests.<sup>28</sup> Accordingly,

<sup>27</sup> See, e.g., *Friedman*, 440 U.S. at 13 (ban on optometrists' use of trade names justified by "significant possibility" of mislead[ing] the public.); *Zauderer v. Off. of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (notice of client responsibility for certain costs required in contingent fee messages because "reasonably related to the State's interest in preventing deception of consumers") (footnote omitted); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978) (ban on attorney solicitation permitted in situation "inherently conducive to overreaching and other forms of misconduct").

<sup>28</sup> See, e.g., *Discovery Network*, 113 S. Ct. at 1511 (rejecting contention that "low value" of commercial speech justified ban on distribution of commercial newsracks to promote safety and esthetics); *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993) (striking ban on personal solicitation by certified public accountants and recognizing that "the general rule is that the speaker and the audience, not the government, assess the value of the information presented"); *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990) (plurality opinion) (overturning attorney censure and reaffirming "the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information");

equalizing the protection afforded to commercial speech and noncommercial speech would not require substantial modification of governmental policies previously approved by the Court.<sup>29</sup>

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*Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 479-80 (1988) (truthful, non-deceptive letters sent to individuals known to face particular legal problems were constitutionally protected); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 80 (1983) (Rehnquist, J., concurring) (striking down ban on truthful unsolicited advertisements); *In re R.M.J.*, 455 U.S. 191 (1982) (rule limiting dissemination of truthful advertising violated First Amendment); *Central Hudson*, 447 U.S. at 571-72 (regulation restricting non-deceptive advertisements promoting use of electricity violated First Amendment); *Bates v. State Bar*, 433 U.S. 350, 384 (1977) (truthful attorney advertising constitutionally protected); *Cary v. Population Servs. Int'l.*, 431 U.S. 678, 701-02 (1977) (restriction on contraceptives ads invalidated because it did more than limit misleading or deceptive speech); *Linmark*, 431 U.S. at 98 (striking ordinance prohibiting for-sale signs because it inhibited free flow of truthful information); *Bigelow v. Virginia*, 421 U.S. 809, 828-29 (1975) (barring prosecution for running non-deceptive advertisement for legal service).

<sup>29</sup> The Court has found against a commercial speaker disseminating a truthful and non-misleading message in only three cases. The first, *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986), involved a regulation limiting the advertising of casino gambling—an activity long subjected to special regulation by the state—to residents of Puerto Rico. The second, *Board of Trustees v. Fox*, 492 U.S. 469 (1989), is best understood, and should have been analyzed, as a right of access case involving a rule of general applicability affecting many business activities in addition to commercial speech. See *Heffron v. International Society of Krishna Consciousness*, 452 U.S. 640 (1981) (state fair may require that sale or distribution of any merchandise on state fair grounds be licensed). The third, *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), involved advertising messages about a service—lotteries—that are traditionally subject to intensive state regulation. Moreover, the type of services that the broadcaster in *Edge Broadcasting* sought to advertise was illegal in the state in which the broadcaster was located.



**D. Distinguishing Between Commercial and Noncommercial Messages Is Often a Difficult, if Not Futile, Exercise.**

This Court has made clear "that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. Speech likewise is protected even though it is carried in a form that is 'sold' for profit . . . , and even though it may involve a solicitation to purchase or otherwise pay or contribute money." *Virginia Pharmacy*, 425 U.S. at 761-62 (citations omitted) (giving examples of books, motion pictures, and religious literature).<sup>30</sup> On the other hand, this Court has classified as "commercial" those messages that propose a commercial transaction or that "relate[] solely to the economic interests of [the] audience," *Central Hudson*, 447 U.S. at 561. The distinction between these categories, however, is elusive at best. The difficulty of differentiating between commercial and noncommercial speech provides additional support for treating them equally.

It is often difficult "in the first instance [to] decid[e] whether the proposed speech is commercial or noncommercial. In individual cases, this distinction is anything but clear." *Metromedia*, 453 U.S. at 536 (Brennan, J., concurring). Recently, in *Discovery Network*, the Court acknowledged "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." 113 S. Ct. at 1511. This problem exists not only in seeking to distinguish between "newspapers" and "commercial handbills," as was the issue in *Discovery Network*, but also in seeking to determine whether an advertisement is "proposing a commercial transaction" or expressing a political opinion.<sup>31</sup>

<sup>30</sup> See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) ("To avoid placing such a handicap upon the freedoms of expression, [statements] do not forfeit [First Amendment] protection because they were published in the form of a paid advertisement.").

<sup>31</sup> For example, as Justice Brennan famously posed the problem, it is essentially impossible to distinguish among billboards that say

Moreover, the Court's highly artificial and forced distinction between commercial and noncommercial speech encourages "those who seek to convey commercial messages [to] engage in the most imaginative of exercises to place themselves within the safe haven for noncommercial speech, while at the same time conveying their commercial message." *Metromedia*, 453 U.S. at 540. Conversely, a government may attempt to discriminate against a particular viewpoint by regulating its preferred mode of commercial dissemination and justifying that ordinance as merely a restriction on commercial speech. *Discovery Network*, 113 S. Ct. at 1513-14 n.19.<sup>32</sup>

Indeed, the examples described above demonstrate "the absurdity of treating all commercial speech as less valuable than all noncommercial speech." *Id.* at 1520 (Blackmun, J., concurring). It is a futile enterprise with dangerous consequences that should be abandoned.

### CONCLUSION

For the reasons set forth herein, *amici* submit that the City of Ladue's ordinance is unconstitutionally content-based. Accordingly, the Court should affirm the Eighth Circuit's decision, not on the grounds that the ordinance elevates commercial speech over noncommercial speech, but based on the illegitimate distinctions the ordinance makes between protected communications. In the proc-

"Visit Joe's Ice Cream Shoppe," "Because Joe thinks that dairy products are good for you, please shop at Joe's Shoppe," and "Joe says to support dairy price supports: they mean lower prices for you at his Shoppe." *Metromedia*, 453 U.S. at 538-539. See also Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 638-48 (1990) (listing numerous existing advertising examples and judicial decisions which demonstrate the difficulty in defining commercial speech).

<sup>32</sup> See also *Metromedia*, 453 U.S. at 536-37 (Brennan, J., concurring) (allowing a government to determine whether speech is commercial or noncommercial "entail[s] a substantial exercise of discretion by a city's official" and thus "presents a real danger of curtailing noncommercial speech in the guise of regulating commercial speech").



ess, the Court should make clear that commercial speech is to be accorded the same level of constitutional protection as noncommercial speech.

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December 14, 1993

9  
No. 92-1856

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

CITY OF LADUE, *et al.*,  
*Petitioners,*  
v.  
MARGARET P. GILLEO,  
*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Eighth Circuit

**BRIEF OF PEOPLE FOR THE AMERICAN WAY  
AND AMERICAN JEWISH CONGRESS AS  
AMICI CURIAE IN SUPPORT OF THE RESPONDENT**

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## QUESTION PRESENTED

Whether a city ordinance that prohibits citizens from displaying political and ideological signs on their residential property, while permitting them to display other commercial and non-commercial signs, violates the First Amendment?



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

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No. 92-1856

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CITY OF LADUE, *et al.*,  
*Petitioners,*

v.

MARGARET P. GILLO, *Respondent.*

---

On Writ of Certiorari to the  
United States Court of Appeals  
for the Eighth Circuit

---

**BRIEF OF PEOPLE FOR THE AMERICAN WAY  
AND AMERICAN JEWISH CONGRESS AS  
AMICI CURIAE IN SUPPORT OF THE RESPONDENT**

---

**INTEREST OF THE AMICI\***

People for the American Way is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People for the American Way now numbers more than 300,000 members nationwide.

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\* Counsel for both petitioners and respondent have consented to the filing of this brief *amici curiae*. Their consents are on file with the Clerk of the Court.

The American Jewish Congress is an organization of American Jews founded in 1918. It is dedicated to the preservation of the civil, political, economic and religious rights of American Jews and all Americans.

These *amici* have filed briefs in this Court in other cases that implicated their members' concerns for protecting First Amendment freedoms. See, e.g., *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S.Ct. 2217 (1993); *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991); *United States v. Eichman*, 496 U.S. 310 (1990); *Edwards v. Aguillard*, 482 U.S. 578 (1987). The *amici*'s concern in this case is to assure that Americans remain free to engage in political and ideological speech by displaying signs, posters, banners and other such materials in their yards, on their homes and in their windows. While a city reasonably may regulate the size, number and placement of these signs in order to promote safety and aesthetics, the city cannot, consistent with the First Amendment, impose an absolute ban on these signs, as did the City of Ladue. It is particularly impermissible for a city to prohibit political or ideological signs while, as here, permitting certain commercial signs as well as non-commercial signs that are not political or ideological.

### SUMMARY OF THE ARGUMENT

In early 1991, Margaret Gilleo posted a single 8-1/2-by-11-inch sign in the second-story window of her home in Ladue, Missouri, that read "FOR PEACE IN THE GULF." Ms. Gilleo thereby violated the City of Ladue's newly enacted sign ordinance, which prohibits the display of any "sign," "insignia" or "banner" on any residential property that "publicizes an . . . activity, opinion, person, institution [or] organization." The City had earlier construed a predecessor ordinance to bar Ms. Gilleo from placing a sign in her yard that urged persons to "CALL CONGRESS NOW" about the Persian Gulf situation.

The Ladue sign ordinance does not, however, ban all signs from the residential property of Ladue. Citizens are free to display "residence identification signs" as well as "For Sale" and

"For Rent" signs in their yards and windows. Moreover, while citizens cannot display signs at their homes concerning any political, religious or social activities (or many commercial activities) that may be taking place there, no such prohibition applies to schools or churches, or to businesses in the commercial and industrial areas of Ladue. The ordinance thus expressly discriminates on the basis of content against political and ideological speech. It also discriminates against the speech of individual citizens, and in favor of the speech of educational, religious and business institutions.

The sign ordinance violates the First Amendment right of Ms. Gilleo and other citizens of Ladue to engage in a venerable form of political speech on their own residential property. The ordinance cannot, as petitioners suggest, be justified as a valid time, place or manner regulation. The ordinance is not content-neutral, but instead by its terms favors certain speech on the basis of its content. Nor is the ordinance narrowly tailored to serve the City's asserted interests in preventing the aesthetic and safety problems that may be caused by sign proliferation. Those interests can be adequately served merely by regulating the number, size and placement of signs on residential property, rather than by banning political, ideological and many other types of signs entirely. Furthermore, because the ordinance eliminates a medium of expression that is singularly inexpensive, efficient and effective for conveying political and ideological views, the ordinance does not leave open ample alternative channels of communication.

As a facially content-based restriction on political speech, therefore, the Ladue sign ordinance is subject to the most exacting scrutiny. It is not among those rare laws that can survive such scrutiny. The aesthetic and safety interests that purportedly motivated the sign ordinance, while more than trivial, are not the sorts of interests that this Court has ever suggested are compelling. An absolute prohibition against most categories of signs on residential property is not, moreover, essential to serve those aesthetic and safety interests. The Court of Appeals thus

correctly held that the sign ordinance violates the First Amendment.

### ARGUMENT

#### THE LADUE SIGN ORDINANCE VIOLATES THE FIRST AMENDMENT BY PROHIBITING CITIZENS FROM EXPRESSING THEIR OWN POLITICAL AND IDEOLOGICAL VIEWS ON THEIR OWN PROPERTY

##### A. This Case Implicates Core First Amendment Concerns

This is a case in which the individual's claim to First Amendment protection is at its zenith. The City of Ladue is seeking to prohibit its citizens from engaging in speech on public issues, which "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 467 (1980). The prohibition is directed at a time-honored form of communication — outdoor signs, posters and banners — that is "virtually pure speech," rather than speech combined with conduct. *Arlington County Republican Comm. v. Arlington County*, 983 F.2d 587, 593 (4th Cir. 1993) (quoting *Baldwin v. Redwood City*, 540 F.2d 1360, 1366 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977)). Moreover, citizens are being barred from engaging in this pure political speech on their own residential property — where, as this Court and the lower courts have recognized, the government's authority to interfere with a citizen's exercise of First Amendment rights is exceedingly limited. See, e.g., *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85 (1977); *Spence v. Washington*, 418 U.S. 405 (1974) (per curiam); cf. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 811 (1984) (recognizing the significance under the First Amendment of "[t]he private citizen's interest in controlling the use of his own property").

#### 1. The Ladue Sign Ordinance Strikes At Political And Ideological Speech At The Heart Of The First Amendment's Protections

This Court has repeatedly observed that "the First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide open,' and ha[s] consistently commented on the central importance of protecting speech on public issues." *Boos v. Barry*, 485 U.S. 312, 318 (1988) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). This is because "[s]peech concerning public affairs is more than self expression; it is the essence of self-government." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)). The Court has thus emphasized that, by "limit[ing] the means by which [persons] may participate in the public debate on . . . controversial issues of national interest and importance," the government "strikes at the heart of the freedom to speak." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535 (1980).<sup>1</sup>

<sup>1</sup> Contrary to petitioners' suggestion (e.g., Br. for Pet'rs at 33), the Court's recent decision in *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993), does not even suggest that political and ideological speech is not still entitled to the highest degree of First Amendment protection. Indeed, the Court in *Discovery Network* reaffirmed the primacy of noncommercial speech, while acknowledging that commercial speech also has considerable value. See 113 S. Ct. at 1511-14; see also *id.* at 1521 (Blackmun, J., concurring) (expressing hope that "the Court ultimately will . . . afford[] full protection for truthful, noncoercive commercial speech about lawful activities") (emphasis added). Nothing in *Discovery Network* suggests that a city can discriminate, as Ladue has here, against political and ideological speech, and in favor of commercial speech, without some truly compelling justification. See *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 610 (9th Cir. 1993) (*Discovery Network* did not alter "commercial-non-commercial analytical distinction" with respect to billboard regulation).



The Ladue sign ordinance does precisely that. The ordinance expressly prohibits citizens from displaying any "sign," "banne[r]," "insignia" or similar object on their residential property that "publicizes an . . . activity, opinion, person, institution [or] organization." Chapter 35, § 35-1 (J.A. 120). The ordinance also forbids all political and ideological signs, while allowing certain commercial signs, in the commercial and industrial districts of Ladue. The City of Ladue has construed the ordinance as prohibiting Ms. Gilleo from expressing her views on the Persian Gulf War by placing an 8-1/2-by-11-inch sign stating "FOR PEACE IN THE GULF" in a second-story window of her home. (J.A. 188). The City construed a similar predecessor ordinance to bar Ms. Gilleo from maintaining a yard sign that read "SAY NO TO WAR IN THE PERSIAN GULF/CALL CONGRESS NOW." (J.A. 23-24).

A citizen of Ladue is, therefore, absolutely prohibited from engaging in political or ideological expression on his residential property by means of "[t]he outdoor sign or symbol" — "a venerable medium for expressing political, social and commercial ideas" that has "played a prominent role throughout American history, rallying support for political and social causes." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion) (quoting lower court dissenting opinion). A variety of outdoor signs and symbols, many of which would be at risk under the Ladue ordinance, confirm the enduring vitality of this medium of expression: the broadsides that called upon Americans of an earlier era to join the cause of liberty; the red, white and blue banners and bunting that Americans have long utilized both to endorse and to condemn our nation's policies; the gold and blue stars that families of U.S. military personnel proudly displayed in the front windows of their homes during World War II; the yellow ribbons and "Welcome Home" signs that have more recently celebrated the release of Americans held hostage in foreign lands; the colorful yard signs that spring up during election season, belying assertions that we are a politically apathetic people.

Yet, the City of Ladue would seem to tolerate little, if any, of this political discourse, just as the City would not tolerate Ms. Gilleo's "FOR PEACE IN THE GULF" sign. The City's ban on this vital means of political and ideological expression thus "strikes at the heart of [its citizens'] freedom to speak." *Consolidated Edison*, 447 U.S. at 535.

The Ladue sign ordinance does not, of course, suppress only political and ideological speech. The ordinance also reaches many other signs that are common in modern suburbia, such as "It's a Girl," "Happy Holidays," "Go Cardinals," "Garage Sale Saturday" and "Neighborhood Crime Watch." The ordinance appears to prohibit a homeowner even from attempting to protect his privacy by posting a "No Solicitors" or "Do Not Disturb" sign on his front door.<sup>2</sup>

## 2. The Ladue Sign Ordinance Prohibits Citizens From Engaging In Political And Ideological Speech On Their Own Residential Property

This Court has often explained that "the standards by which limitations on speech must be evaluated 'differ depending on the character of the property at issue.'" *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983)); accord *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75 (1981). A restriction that, like the Ladue sign ordinance, prevents persons from engaging in First Amendment activity on their own property must meet a particularly exacting standard.

<sup>2</sup> The Court has recognized that such signs are a particularly appropriate means of reconciling the homeowner's privacy interests with the First Amendment rights of door-to-door canvassers, leafletters and solicitors. E.g., *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 639 (1980). Yet, while contending that Ms. Gilleo should personally confront her neighbors at their homes rather than post a sign in her own yard or window (Br. for Pet'rs at 40-41), the City would deny those neighbors the most effective means of avoiding such an encounter.

In *Consolidated Edison*, for example, the Court held that the New York Public Services Commission could not bar a utility company from enclosing materials in its billing envelopes that expressed its views on nuclear power and other public controversies. 447 U.S. at 533-44. The Court emphasized that "Consolidated Edison has not asked to use the offices of the [Public Services] Commission as a forum from which to promulgate its views," but instead "seeks merely to utilize its own billing envelopes to promulgate its views on controversial issues of public policy." *Id.* at 539-40. Accordingly, said the Court, "the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property." *Id.* at 540.

Similarly, in overturning an individual's conviction in *Spence* for hanging an American flag decorated with a peace symbol from the window of his apartment, the Court noted no fewer than three times that the activity occurred on private property, 418 U.S. at 406, 409, 411, rather than "in an environment over which the State by necessity must have certain supervisory powers unrelated to expression." *Id.* at 411. Indeed, the Court specifically observed that the fact that the decorated flag had been displayed on private property was one of "[a] number of factors [that] are important in the instant case." *Id.* at 408. It was therefore not "a case that might be analyzed in terms of reasonable time, place, or manner restraints on access to a public area." *Id.* at 409; cf. *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (a citizen has a First Amendment right not to be compelled to display the state's ideological message "on his private property").<sup>3</sup>

<sup>3</sup> Other cases have also concluded that the individual's right to engage in First Amendment activity applies with particular force at his own home. In invalidating an ordinance barring door-to-door leafletting in *Martin v. City of Struthers*, 318 U.S. 141 (1943), the Court considered the First Amendment rights of both homeowners and leafletters. The Court explained that the ordinance improperly "substitut[e]d the judgment of the community for the judgment of the individual

The decisions of this Court and the lower courts in cases involving First Amendment challenges to municipal sign regulations evince a particular concern with allowing individuals to express themselves on their own residential property. In *Linmark Associates*, the Court invalidated an ordinance that prohibited homeowners from posting real estate "For Sale" and "Sold" signs. 431 U.S. at 91-98. The Court explained that an individual's other alternatives for selling his property, such as newspaper advertising, involved "less autonomy" than "a 'For Sale' sign in front of the house to be sold." *Id.* at 93.

In *Vincent*, while upholding a Los Angeles ordinance that prohibited the posting of signs on public property, the Court indicated that a ban against signs on private property would present more significant constitutional issues, given "[t]he private citizen's interest in controlling the use of his own property." 466 U.S. at 811. Moreover, in concluding that the ordinance did not unduly interfere with citizens' right to engage in political speech, the Court emphasized that citizens remained free to display their signs on private property. *Id.* at 795, 812. As the Court observed, "by not extending the ban to [private property], a significant opportunity to communicate by means of temporary signs is preserved." *Id.* at 811.

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householder," because the leafletter would be subject "to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it." *Id.* at 144. The Court emphasized that the government should "leav[e] the decision as to whether distributors of literature may lawfully call at a home where it belongs — with the homeowner himself." *Id.* at 148; see also, e.g., *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Stanley v. Georgia*, 394 U.S. 557 (1969). An individual's right to express his views on his own property is, moreover, analogous to an individual's right to express his views on his own person. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971); *Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503 (1969).



The lower courts have consistently held that, whatever a city's authority may be to regulate signs on public property, a city cannot prevent its citizens from displaying signs on their own residential property. For example, while this Court did not have occasion in *Metromedia* to address the constitutionality of an ordinance that would prohibit citizens from placing political signs in their own yards, the California Supreme Court did consider the issue in the opinion ultimately reviewed by this Court. *Metromedia, Inc. v. City of San Diego*, 610 P.2d 407 (Cal. 1980), *rev'd*, 453 U.S. 490 (1981). The California Supreme Court construed the San Diego ordinance at issue as permitting "a small sign placed in one's front yard proclaiming a political or religious message" — a construction that the court deemed necessary in order "to avoid the risk of unconstitutional overbreadth which a broad construction of the ordinance might entail." *Id.* at 410 n.2; *see also Metromedia*, 453 U.S. at 494 n.2 (noting California Supreme Court's limiting construction).

Other lower courts have uniformly invalidated municipal ordinances that restrict an individual's right to display a political or ideological sign on his own residential property. *E.g.*, *Arlington County Republican Comm.*, 983 F.2d at 595 (explaining that a restriction on political yard signs "infringes on the rights of two groups: the candidates and the homeowners," because "[h]omeowners also express their views by posting political signs in their yard"); *Matthews v. Town of Needham*, 764 F.2d 58, 61 (1st Cir. 1985) (emphasizing that the sign ordinance at issue, unlike the ordinance in *Vincent*, "touches on private property" and thus was invalid); *Baldwin*, 540 F.2d at 1373 (recognizing "the right of residents to express their own views" on political issues by displaying signs in their yards); *State v. Miller*, 416 A.2d 821, 827 (N.J. 1980) ("ordinances which exclude political signs from residential districts have uniformly been held unconstitutional"); *cf. State v. Hodgkiss*, 565 A.2d 1059, 1062 (N.H. 1989) (Souter, J.) (observing that restrictions on posting signs on trees and poles

located on private property could present "constitutional problems").<sup>4</sup>

This is not, therefore, a case involving "the law of billboards," and the "unique set of problems" presented by such "large, immobile, and permanent structure[s]" on commercial property. *Metromedia*, 453 U.S. at 501-02. Nor is it a case involving a municipality's management of its own property. *See Vincent*, 466 U.S. at 813-15. It is, instead, a case about an individual homeowner's right to place a single sign in her own yard or in her own window to express her views on a controversial public issue. None of this Court's authorities suggest that the City of Ladue's absolute prohibition against such signs can be squared with the First Amendment.<sup>5</sup>

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<sup>4</sup> *See also, e.g., Whitton v. City of Gladstone*, 1993 U.S. Dist. LEXIS 13026, \*17, \*20 (W.D. Mo. Sept. 17, 1993) ("that Gladstone attempts to regulate a resident's exercise of speech in his or her own yard demands that the court apply more exacting, not less scrutiny than it would in analyzing a content-based regulation in public forum cases"); *Loftus v. Township of Lawrence Park*, 764 F. Supp. 354 (W.D. Pa. 1991); *Runyon v. Fasi*, 762 F. Supp. 280 (D. Haw. 1991); *Tauber v. Town of Longmeadow*, 695 F. Supp. 1358 (D. Mass. 1988); *Metromedia, Inc. v. Mayor and City Council of Baltimore*, 538 F. Supp. 1183 (D. Md. 1982); *Martin v. Wray*, 473 F. Supp. 1131 (E.D. Wis. 1979); *Orazio v. Town of North Hempstead*, 426 F. Supp. 1144 (E.D.N.Y. 1977); *Pace v. Village of Walton Hills*, 238 N.E.2d 542 (Ohio 1968); *cf. Collier v. City of Tacoma*, 854 P.2d 1046 (Wash. 1993) (invalidating restrictions on political signs under free speech provision of Washington Constitution).

<sup>5</sup> The petitioners and their *amici* suggest that, if the Ladue sign ordinance is held to be unconstitutional, then the Highway Beautification Act of 1965, 23 U.S.C. § 131 (1988), must also be presumed to be unconstitutional. *See Br. for Pet'rs* at 48-50; *Br. Amicus Curiae of Hawaii et al.* at 3-14. These concerns are, at best, premature. It is questionable whether the Act's restrictions on "outdoor advertising signs, displays, and devices," 23 U.S.C. § 131(a) (1988), encompass the small political and ideological signs on residential property that are at issue in



**B. The Ladue Sign Ordinance Cannot Withstand First Amendment Scrutiny As A Content-Neutral "Time, Place And Manner" Regulation**

The petitioners attempt to justify the Ladue sign ordinance as a valid "time, place and manner" regulation notwithstanding that the ordinance prohibits citizens from posting political or ideological signs at *any* time, in *any* place on their residential property, and in *any* manner within the City of Ladue. Cf. *United States v. Grace*, 461 U.S. 171, 178 (1983) (contrasting "reasonable time, place, and manner regulations" with "an absolute prohibition on a particular type of expression"). However, even applying the standard that petitioners agree is applicable to the analysis of time, place and manner regulations, the ordinance cannot be sustained.

This Court has stated that a time, place and manner regulation can withstand First Amendment scrutiny only if three criteria are satisfied: the regulation must be "content-neutral," the regulation must be "narrowly tailored to serve a significant government interest," and the regulation must "leave open ample alternative channels of communication." *Frisby*, 487 U.S. at 481 (quoting *Perry Educ. Ass'n*, 460 U.S. at 45). The Ladue sign ordinance fails each of these requirements.

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this case.

Moreover, the Act prohibits only "outdoor advertising" that is outside an area zoned for business or industrial use, visible from the highway and, except in rural areas, within 660 feet of the right-of-way. 23 U.S.C. § 131(b), (d) (1988). No evidence has been presented in this case as to whether the Act would, like the Ladue sign ordinance, entirely prohibit citizens who reside near interstate or primary highways from publicly displaying signs anywhere on their residential property. Of course, as Justice White observed in *Metromedia*, "[w]hether, in fact, the distinction [between the Act and a local sign ordinance] is constitutionally significant can only be determined on the basis of a record establishing the actual effect of the Act on [signs] conveying noncommercial messages." 453 U.S. at 515 n.20.

**1. The Ladue Sign Ordinance Is Not Content-Neutral, But Instead Discriminates Against Political And Ideological Speech**

"The 'First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic.'" *Boos v. Barry*, 485 U.S. 312, 319 (1988) (quoting *Consolidated Edison*, 447 U.S. at 537). The Ladue sign ordinance is content-based because citizens are prohibited from engaging in speech on multiple "entire topic[s]" -- including any conceivable political or ideological issue -- through the medium of signs in their yards, on their houses and in their windows. At the same time, the City permits signs on certain favored commercial and non-commercial topics. Indeed, the sign ordinance discriminates not only against particular speech, but also against particular speakers, because the speech of schools, churches and other institutions is favored over the speech of ordinary citizens.

The Ladue sign ordinance, while generally prohibiting a homeowner from displaying any "signs," "insignias," "banners," "pennants" and other such materials on his residential property, contains two express exceptions: "residence identification signs" and "[g]round signs advertising the sale or rental of real property." Chapter 35, §§ 35-4 to 35-10 (J.A. 121-22, 126).<sup>6</sup> Nothing in the ordinance appears to preclude a homeowner from posting a "residence identification sign" that identifies his residence as that of a physician, a lawyer, a certified public accountant or other professional, and thereby advertising the occupation that he pursues either at the residence or elsewhere. The ordinance thus permits a citizen to display certain categories

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<sup>6</sup> Real estate signs may be up to six square feet in size, which appears to have been approximately the size of Ms. Gilleo's yard sign (see J.A. 194). Residence identification signs may be up to one square foot in size, and thus larger than Ms. Gilleo's window sign (see *Gilleo v. City of Ladue*, 986 F.2d 1180, 1182 (8th Cir. 1993)). Chapter 35, §§ 35-4 to 35-10 (J.A. 121-22, 126).

of commercial and non-commercial signs on his residential property -- e.g., "House for Sale," "House for Rent," "Bill Jones, C.P.A.," "The Smith Residence" -- while absolutely prohibiting a citizen from displaying any political or ideological signs, or signs on other commercial or non-commercial topics.<sup>7</sup>

The Ladue sign ordinance also favors certain speech of businesses and others enterprises located in commercial or industrial areas over the speech of individual homeowners. Those who own or rent property in areas zoned for commercial or industrial use may display signs that "directly relate[] to the activity taking place on the property." Br. for Pet'rs at 28. But citizens cannot display signs on their residential property that relate to political, religious, social or certain commercial activity taking place on the property -- activity such as "meet the candidate" coffees, meetings of neighborhood improvement associations, block parties or garage sales. Accordingly, if Ms. Gilleo were to coordinate a "Peace in the Gulf" Committee out of her residence in Ladue, she could not display a sign in her yard announcing the Committee's activities. In contrast, if the U.S. Army were to operate a recruiting office in the business district of Ladue, it could post signs urging young people to sign up to wage war in the Gulf. Chapter 35, § 35-4 (J.A. 121-22).

Moreover, the Ladue sign ordinance permits churches, other religious institutions and schools located in residential districts to make more extensive use of signs than can individual homeowners. Each church, religious institution or school is allowed

<sup>7</sup> It makes no difference that the City of Ladue was foreclosed by Missouri law from banning real estate signs, see Mo. Rev. Stat. § 67.317 -- a result that may well have been compelled in any event by this Court's decision in *Linmark Associates*, 431 U.S. at 94-97. The City of Ladue still had the choice whether to treat political and ideological signs more favorably, as favorably or less favorably than real estate signs. The City chose to discriminate against political and ideological speech, not only in favor of real estate signs, but also in favor of any commercial or non-commercial message that might be displayed on a "residence identification sign."

one "identification sign," one permanent bulletin board or ground sign, and one "temporary sign" that can remain in place for up to sixty days. Chapter 35, § 35-5 (J.A. 122-23). These signs may contain "the name of such church, religious institution, or school, its services, activities or other functions." *Id.* There is nothing in the ordinance to preclude a church or other religious institution from displaying a sign announcing, and thereby endorsing, political and ideological activities. It would hardly be unprecedented for a church or religious institution to advertise, for example, "Mass for the Unborn," "Prayer Vigil for Peace in the Gulf," "Sunday's Sermon: Restoring God to Our Schools," or an appearance by a political candidate favored by parishioners. To be sure, religious and educational institutions are constrained in their ability to engage in political and ideological speech, because that speech must to some extent relate to their "services, activities or other functions." But they still have considerably greater freedom to convey political and ideological messages than do ordinary citizens. Of course, these institutions are also allowed to post signs on other topics -- e.g., rummage sales, potluck dinners and casino nights -- while homeowners are barred from posting signs announcing their own social activities and most commercial activities.

The petitioners contend that the ordinance is content neutral -- even though it discriminates by its terms in favor of particular topics of speech -- because this discrimination has a "content-neutral explanation." Br. for Pet'rs at 24. But the Court squarely rejected such an argument just last Term in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516-17 (1993). The City of Cincinnati in that case, much like the City of Ladue here, sought to sustain a newsrack ordinance that expressly accorded different treatment to different categories of speech, arguing that "the justification for the regulation is content neutral" because "the interests in safety and esthetics that it serves are entirely unrelated to the content of respondents' publications." *Id.* at 1516. The Court concluded, however, that the Cincinnati ordinance was plainly content-based, whether or not its drafters



had intended to suppress discussion of particular topics or ideas. As the Court explained:

Regardless of the *mens rea* of the city, it has enacted a sweeping ban on the use of newsracks that distribute "commercial handbills," but not "newspapers." Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus by any commonsense understanding of the term, the ban in this case is "content-based."

*Id.* at 1516-17; see also *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991).<sup>8</sup>

So, too, whether or not any particular sign falls within the City of Ladue's ban is determined by the content of that sign. If a sign carries a political or ideological message, then the sign is absolutely forbidden. If, however, the sign concerns the sale or rental of real estate, or the identity of the residents of the house, or the activities of a church or school, or the products or services offered on-site by a business in a commercial or industrial zone, then the sign may be permitted. It would be contrary to "any commonsense understanding," therefore, to treat the Ladue sign ordinance as anything other than content-based.<sup>9</sup>

<sup>8</sup> This case, like *Discovery Network* and *Simon & Schuster* and unlike *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), concerns a regulation that expressly treats speech on certain topics differently from speech on other topics. In contrast, *Ward* involved an ordinance that was neutral on its face, applying to all speakers who used the Central Park Bandshell, and that, at most, may have incidentally affected some speech (*e.g.*, rock concerts) more than others (*e.g.*, operas).

<sup>9</sup> The petitioners suggest that, if the Ladue sign ordinance cannot be upheld as a time, place and manner regulation because it is content-based, then the ordinance might still be upheld under the "secondary effects" doctrine. See *Br. for Pet'rs* at 42-44. But the Court has applied

## 2. The Ladue Sign Ordinance Is Not Narrowly Tailored To Address The City's Aesthetic And Safety Interests, But Instead Imposes An Absolute Ban On Political And Ideological Signs On Residential Property

The Ladue sign ordinance fails to satisfy the standard for a valid time, place and manner regulation for a second reason: The ordinance is not "narrowly tailored" to advance a "significant government interest" in aesthetics and safety. *Frisby*, 487 U.S. at 481 (quoting *Perry Educ. Ass'n*, 460 U.S. at 45).

In order to assess whether the Ladue sign ordinance is sufficiently "narrowly tailored," one must first ascertain the interest that it is designed to serve. The petitioners assert that the ordinance is intended to address the aesthetic and safety concerns

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speech only in one narrow category of cases: cases challenging municipal zoning ordinances governing the location of businesses purveying sexually explicit materials. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). The Court has not applied this doctrine to uphold content-based regulations of other types of expression.

Moreover, the Court has allowed the secondary effects doctrine to be used only to channel a particular medium of speech to a particular location, not to ban the medium entirely. *Cf. Shad*, 452 U.S. at 73-74 (declining to apply secondary effects doctrine to citywide prohibition of live entertainment). The Ladue sign ordinance, however, imposes an absolute prohibition on the display of political and ideological signs on residential property throughout the City.

Finally, as the Court made clear in *Renton*, a content-based regulation can pass constitutional muster under the secondary effects doctrine only if the regulation is "narrowly tailored" to reach only speech that produces the unwanted secondary effect and "allows for reasonable alternative avenues of communication." 475 U.S. at 52-53. As explained in the text, the Ladue sign ordinance is not narrowly tailored to serve the City's interest in preventing sign proliferation and "visual blight." See *infra* pp. 17-22. Nor does the ordinance leave open sufficient "alternative avenues of communication." See *infra* pp. 22-26.



ordinance is intended to address the aesthetic and safety concerns that might be posed by "the proliferation of signs in Ladue and the resulting blight." Br. for Pet'rs at 3. They do not appear to suggest, therefore, that allowing citizens to display a single small sign in their yard or window would itself constitute "blight."<sup>10</sup> They appear, instead, to be concerned with the uncontrolled multiplication of signs on a given piece of property -- the sort of visual blight that motivated the prohibition against signs on public property in *Vincent*. However, when the property on which the signs would be displayed is private residential property rather than public property, there is no reason to conclude that visual blight cannot be prevented by limiting the number, size or placement of signs, rather than by prohibiting them.

Indeed, the City of Ladue has implicitly conceded as much in its regulation of other sorts of signs. The City did not address the aesthetic and safety concerns posed by commercial signs in its business and industrial districts by banning these signs entirely. Instead, the City chose to regulate the number of signs on any piece of commercial property, the size and location of those signs, and even the type of lighting used on the signs. See Chapter 35, §§ 35-6 to 35-9, 35-11 (J.A. 123-27). An accommodation was thus achieved among the City's interest in preventing the unchecked proliferation of commercial signs, local business owners' interest in publicizing their goods and services, and consumers' interest in receiving that information.

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<sup>10</sup> Curiously, petitioners assert that, while the sign ordinance expressly prohibits all "banners" and "pennants" on residential property, citizens are free to display an unlimited number of "flags" on their homes and in their yards, so long as "they are made of fabric and are not in the shape of a banner or pennant." Br. for Pet'rs at 40. No such distinction is contained in the ordinance itself. The petitioners' litigating position suggests, at least, that the City's concept of "blight" is somewhat limited, and requires something more than a single colorful foreign object on every residential lot in Ladue. Petitioners have not explained why "flags" could be assumed to pose any lesser aesthetic or safety threat than "banners," "pennants" or "signs."

The City of Ladue abandoned this regulatory approach, however, with respect to political and ideological signs. The City did not seek to advance its aesthetic and safety interests by limiting the number of signs that a citizen could display on his residential property. Nor did the City regulate the size of the signs, the distance of the signs from the street, or the duration that the signs could remain in place. Accordingly, rather than adopting a regulatory scheme that sought to accommodate the First Amendment interests of its citizens in engaging in public debate through political and ideological signs on their residential property, the City simply banned all such signs. This prohibition is far more extensive than necessary to address any significant aesthetic and safety interests of the City. See *Discovery Network*, 113 S. Ct. at 1510, 1517 (Cincinnati's failure to address its aesthetic and safety concerns about newsracks by "regulating their size, shape, appearance, or number" bore on whether its ban on commercial newsracks was narrowly tailored).

The petitioners erroneously suggest that *Vincent* compels the conclusion that the sign ordinance is narrowly tailored. See Br. for Pet'rs at 38. They invoke the Court's statement in *Vincent* that banning all signs on public property "responds precisely to the substantive problem which legitimately concerns the City," because "the substantive evil -- visual blight -- is not merely a possible byproduct of the activity, but is created by the medium of expression itself." 466 U.S. at 810. But petitioners are attempting to extend the Court's statement in *Vincent* to circumstances entirely unlike those presented in that case.

The district court in *Vincent* had made a specific finding that "the large number of illegally posted signs 'constitute a clutter and visual blight.'" *Id.* at 794 (quoting district court finding). No such finding has been made here. Nor can the district court's finding in *Vincent* be assumed to apply to this case, which involves signs on private residential property, not on public property. The Court recognized in *Vincent* that no effective means existed to control the number of signs on public property -- short of imposing an outright ban -- because all speakers could claim an equal right to post signs on the property. *Id.* at 816; *cf.*

*Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 652-54 (1981).

A different situation exists as to signs on private residential property. As the *Vincent* Court observed, "private property owners' esthetic concerns will keep the posting of signs on their property within reasonable bounds." *Id.* at 811; see *Metromedia*, 610 P.2d at 410 n.2 (construing San Diego sign ordinance to permit "noncommercial signs that present no significant aesthetic blight or traffic hazard," such as "a small sign placed in one's front yard proclaiming a political or religious message"). A city can ensure that these "reasonable bounds" are maintained, moreover, by limiting the number of signs that a homeowner may display, the size of the signs, or where on the property the signs may be placed. A number of lower courts have thus recognized since *Vincent* that efforts to ban all political and ideological signs on private residential property are not narrowly tailored, because the city's aesthetic interest can be fully satisfied by relying on homeowners' own interest in maintaining the appearance of their property, coupled with reasonable regulations as to the number, size or placement of signs at any particular residence.<sup>11</sup>

This case is not, therefore, like *Vincent*, where "the medium of expression itself" was found to constitute "visual blight" because of the uncontrollable proliferation of signs on public property. 466 U.S. at 810. Instead, given that signs on private residential property can be adequately controlled in number and size to satisfy aesthetic concerns (or so this Court assumed in *Vincent*, and no court has found to the contrary), "visual blight" is, at most, "merely a possible byproduct" of such signs. *Id.* It therefore cannot be said that the Ladue sign ordinance, as opposed to the ordinance in *Vincent*, is a precisely tailored means of

<sup>11</sup> See, e.g., *Arlington County Republican Comm.*, 983 F.2d at 594; *Whitton*, 1993 U.S. Dist. LEXIS 13026, at \*18-20; *Runyon*, 762 F. Supp. at 284.

addressing "the substantive evil" of sign proliferation and visual blight. *Id.*<sup>12</sup>

To be sure, to the extent that the City's interest is not to prevent what could legitimately be considered "visual blight," but instead is simply to prevent any sign (except approved signs, such as real estate signs) from being displayed on the residential property of Ladue, then only an absolute prohibition could suffice. However, while the City may have a substantial aesthetic interest in preventing visual blight, the City has no similarly substantial interest in preventing citizens from posting a single small sign in their yards or in their windows, especially given the citizens' countervailing First Amendment interest in expressing their political and ideological views. The City would then be encroaching too far into those "matters of taste and style" that the Constitution properly leaves "so largely to the individual." *Cohen v. California*, 403 U.S. 15, 25 (1971). For just as "one man's vulgarity is another's lyric," *id.*, one homeowner's eyesore is

<sup>12</sup> Nothing in the affidavit of petitioners' expert, Malcolm C. Drummond, suggests that sign regulation, rather than prohibition, would not adequately address the City's aesthetic interests. Rather, Mr. Drummond stated:

[M]any municipalities in St. Louis County which do not strictly limit the erection of signs frequently experience a proliferation of yard signs and placards and temporary and permanent signs in the public rights-of-way[.]

Drummond Aff. ¶ 81 (J.A. 154). Mr. Drummond does not, therefore, state that a municipality could not control sign proliferation by "strictly limit[ing]" to one or two the number of signs on a residential lot and by prohibiting signs in "public rights-of-way." Mr. Drummond does not even suggest, moreover, that any "visual blight" is caused by window signs like the one posted by Ms. Gilleo. Cf. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2711, 2714 (1992) (opinion of O'Connor, J.) (noting that the government had offered no record evidence to support prohibition on leafletting alone, but instead had focused only on problems of leafletting in connection with solicitation).



another's Guernica. Cf. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2711, 2719 (1992) (opinion of Kennedy, J.) ("The First Amendment is often inconvenient. But that is besides the point. Inconvenience does not absolve the government of its obligation to tolerate speech.").<sup>13</sup>

### 3. The Ladue Sign Ordinance Does Not Leave Citizens Ample Alternatives To Engage In Political And Ideological Speech

The Ladue sign ordinance is not a permissible time, place and manner regulation for the further reason that it does not leave citizens with "ample alternative channels of communication" for expressing their political and ideological views. *Frisby*, 487 U.S. at 481 (quoting *Perry Educ. Ass'n*, 460 U.S. at 45).

This Court and the lower courts have recognized the singular communicative value of a sign on one's residential property. In *Linmark Associates*, 431 U.S. at 93, the Court noted that "serious questions exist" as to whether an ordinance prohibiting "For Sale" and "Sold" signs from being posted on residential property left open sufficient alternative means of communication. The Court explained:

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<sup>13</sup> The petitioners do not seriously press their asserted "safety" interest before this Court. Of course, if any real risk exists that yard or window signs could impair traffic safety, the City may regulate the number, size or position of such signs to minimize any such risk. It appears that the City has found these more narrowly tailored measures to be sufficient to address the presumably similar safety concerns posed by commercial signs, signs at churches, religious institutions and schools, and residential "For Sale" and "For Rent" signs. See, e.g., *International Soc'y for Krishna Consciousness*, 112 S. Ct. at 2720 (opinion of Kennedy, J.) (rejecting Port Authority's "half-hearted" argument that ban on expressive activity was justified by security concerns, where persons engaged in expressive activity were not shown to pose any greater security threat than other persons allowed in airports).

The options to which sellers realistically are relegated — primarily newspaper advertising and listing with real estate agents — involve more cost and less autonomy than "For Sale" signs; are less likely to reach persons not deliberately seeking sales information; and may be less effective media for communicating the message that is conveyed by a "For Sale" sign in front of the house to be sold. The alternatives, then, are far from satisfactory.

*Id.* at 93 (citations omitted).

In *Vincent*, in order to conclude that banning signs on public property would not leave speakers without alternative channels of communication, the Court relied on the district court's finding that candidates may "'post their signs and handbills . . . on private property with the permission of the owners thereof.'" 466 U.S. at 795, 812. The Court explained that "a significant opportunity to communicate by means of temporary signs is preserved" by allowing signs to be displayed on private property. *Id.* at 811.

The lower courts have consistently recognized that "occupants who are prohibited from displaying political signs on their residential premises do not have adequate alternative channels for communicating the messages on these signs." R. Douglass Bond, Note, *Making Sense of Billboard Law: Justifying Prohibitions and Exemptions*, 88 Mich. L. Rev. 2482, 2507 (1990) (citing cases). These decisions suggest a number of reasons why yard and window signs are a particularly effective means of expressing one's political and ideological views.

First, yard and window signs are among the least expensive means of communicating one's opinion on a public issue to neighbors and others passing through the community. See, e.g., *Arlington County Republican Comm.*, 983 F.2d at 595; *Baldwin*, 540 F.2d at 1368. This Court has traditionally expressed particular solicitude for means of expression that are "essential to the poorly financed causes of little people." *Martin v. City of Struthers*, 318 U.S. 141, 146 (1943); cf. *Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287,



293 (1941) ("[p]eaceful picketing is the workingman's means of communication").

*Second*, yard and window signs are a significantly less time-consuming means of political or ideological expression than, for example, distributing handbills at the town center or canvassing door-to-door throughout the community. *See, e.g., Arlington County Republican Comm.*, 983 F.2d at 595. As Justice Brennan has explained:

[A] message on a sign will typically reach far more people than one on a handbill. The message on a posted sign remains to be seen by passersby as long as it is posted, while a handbill is typically read by a single reader and discarded. Thus, not only must handbills be printed in large quantity, but many hours must be spent distributing them.

*Vincent*, 466 U.S. at 820 (Brennan, J., dissenting).

As a practical matter, other means of communication, such as leafletting and canvassing, may be foreclosed to many citizens whose time is consumed by work or family obligations. It may also be difficult for many citizens who are elderly or physically disabled to engage in these other means of communication.

*Third*, a yard or window sign is a particularly effective means of calling attention to local issues and candidates. *See, e.g., Baldwin*, 540 F.2d at 1368; *Collier v. City of Tacoma*, 854 P.2d 1046, 1058 (Wash. 1993). In *State v. Miller*, for example, the New Jersey Supreme Court reversed a homeowner's conviction for violating a municipal sign ordinance. 416 A.2d at 826-27. The defendant had posted a sign in his front yard that read:

WELCOME!!  
PROSPECTIVE RESIDENTS OF LAWRENCE  
BROOK GLEN THIS RESIDENT  
AND OTHERS OF RIVA AVE.  
WANT TO WELCOME YOU TO THIS  
FLOOD HAZARD AREA  
GOOD LUCK!!  
INFORMATION AVAILABLE

*Id.* at 823. The court explained that the defendant's yard sign was "the most effective and least expensive way to reach [the defendant's] intended audience — prospective Riva Avenue home purchasers and his neighbors." *Id.* at 827. The court added that, while the defendant might have been able to communicate in person with his neighbors about the issue, "even that would not be a realistic alternative for reaching prospective purchasers of homes in the affected area." *Id.*

The association between the sign, the house and the neighborhood often has communicative value, moreover, regardless of whether the issue under debate is of local, statewide or national interest. It may have special significance that an individual who has a certain kind of house in a certain kind of neighborhood takes a certain political position. For example, if the owner of a large house in an affluent community were to post a sign supporting higher taxes on the wealthy, or if a resident of a historically segregated neighborhood were to post a sign endorsing an African-American candidate, the sign would have meaning beyond the words or graphics within its four corners.

*Fourth*, yard and window signs are a uniquely non-confrontational means of expressing one's political and ideological views, without intruding upon the privacy of one's neighbors by knocking at their doors, or contacting them by telephone or mail. A sign invites neighbors to engage in debate on public issues, without insisting that they do so. Accordingly, contrary to the petitioners' position, yard and window signs actually promote the

City of Ladue's professed interest in "protect[ing] the privacy interests of its residents." Br. for Pet'rs at 43.

Finally, yard and window signs have special value for the proponents of unpopular opinions and unknown candidates that cannot expect to command the attention of the mass media. As the Washington Supreme Court recently observed, a ban on political signs "inevitably favors certain groups of candidates over others," because "[t]he incumbent, for example, has already acquired name familiarity," while "[t]he underfunded challenger" has not. *Collier*, 854 P.2d at 1053; see also *City of Antioch v. Candidates' Outdoor Graphic Serv.*, 557 F. Supp. 52, 59 (N.D. Cal. 1982); Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 Sup. Ct. Rev. 233, 257 (signs on public issues are a means for "persons who do not themselves have access to more traditional media facilities" to promulgate their ideas). The members of this Court have recognized that restrictions on a traditional medium of expressions — such as the yard and window signs in this case — threaten to silence "more marginal voices" who "lack access to more sophisticated media." *International Soc'y for Krishna Consciousness*, 112 S. Ct. at 2720, 2723 (opinion of Kennedy, J.); see also *id.* at 2727 (opinion of Souter, J.).

In sum, the Ladue sign ordinance fails this Court's standard for permissible time, place and manner regulations on three distinct counts: The sign ordinance is not content-neutral, but instead discriminates against political and ideological speech. The sign ordinance is not narrowly tailored to prevent sign proliferation and visual blight, but instead broadly prohibits any political or ideological sign on any residential property within Ladue. And the sign ordinance does not leave open ample alternative channels of expression, especially for "the poorly financed causes of little people." *Martin*, 318 U.S. at 146.

### C. The Ladue Sign Ordinance Cannot Withstand The Strict Scrutiny Mandated Of Content-Based Prohibitions Of Political And Ideological Speech

The Ladue sign ordinance, like the restrictions on political signs near polling places in *Burson v. Freeman*, 112 S. Ct. 1846 (1992), is a "facially content-based restriction on political speech." *Id.* at 1851. The City of Ladue thus "must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Id.* (quoting *Perry Educ. Ass'n*, 460 U.S. at 45); accord *Boos*, 485 U.S. at 321. As this Court has observed, "a law rarely survives such scrutiny." *Burson*, 112 S. Ct. at 1852.

The aesthetic and safety interests that the City advances in support of the sign ordinance, while arguably substantial, see *Metromedia*, 453 U.S. at 507, have never been held by this Court to be "compelling." These interests cannot, for example, be equated with the Tennessee's interest in preserving "the right to vote — a right at the heart of our democracy," which was found sufficiently compelling to justify the far more limited restrictions in *Burson* on political signs in the immediate vicinity of polling places on Election Day. 112 S. Ct. at 1851; see Geoffrey R. Stone, *Fora Americana*, 1974 Sup. Ct. Rev. at 258 (explaining that "an absolute ban on [political signs on private property] would be constitutionally impermissible"). Indeed, while the petitioners baldly assert that the sign ordinance serves "compelling state interests" (Br. for Pet'rs at 47), they do not offer *any* case from *any* court that supports that assertion. The lower courts have consistently held that aesthetics and safety are not compelling interests that could justify prohibitions on political and ideological signs on residential property.<sup>14</sup>

<sup>14</sup> See, e.g., *Whitton*, 1993 U.S. Dist. LEXIS 13026, at \*18; *Loftus*, 764 F. Supp. at 361; *Ross v. Goshi*, 351 F. Supp. 949, 953 (D. Haw. 1972); *Collier*, 854 P.2d at 1054-55; *City of Euclid v. Mabel*, 484 N.E.2d 249, 253-54 (Ohio App. 1984), cert. denied, 474 U.S. 826 (1985); *People v. Middlemark*, 420 N.Y.S.2d 151, 153-54 (Dist. Ct. 1979).

Moreover, even in circumstances where the government can assert a compelling interest in regulating speech, the government still "must demonstrate that its law is necessary to serve the asserted interest" and is "narrowly drawn." *Burson*, 112 S. Ct. at 1851, 1852. The City of Ladue cannot make such a showing here for the reasons explained above. *See supra* pp. 17-22. This Court recognized in *Discovery Network* that a city's failure to address its aesthetic and safety concerns about newsracks "by regulating their size, shape, appearance, or number," rather than by banning commercial newsracks entirely, demonstrated that the ban was not sufficiently narrowly tailored to withstand scrutiny even under the intermediate standard of review applicable to commercial speech. 113 S. Ct. at 1510 & n.13. Clearly, then, the City of Ladue's ordinance prohibiting all political signs, rather than regulating their number, size or location, is not tailored with the precision required of regulations of speech "on the highest rung of the hierarchy of First Amendment values." *Carey*, 447 U.S. at 467.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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December 1993



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## QUESTION PRESENTED

May a city's anti-sign ordinance qualify as a valid content-neutral "place, time, or manner" restriction on protected speech where the ordinance prohibits most signs in residential zones but nonetheless permits signs whose contents fall into any one of nine relatively broad categories -- including signs advertising the sale or rental of real property?

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term 1993

No. 92-1856

CITY OF LADUE, *et al.*,

*Petitioners,*

v.

MARGARET P. GILLES,

*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Eighth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION  
AND ALLIED EDUCATIONAL FOUNDATION AS  
AMICI CURIAE IN SUPPORT OF RESPONDENT

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation is a non-profit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting free speech rights, particularly in the area of commercial speech. To that end, WLF has appeared before this Court as well as other state and federal courts in cases dealing with commercial speech issues, including *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 110 S. Ct. 2281 (1990); *Pacific Gas and Electric Co. v. Public Utility*

*Comm'n of California*, 475 U.S. 1 (1986); and *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in the federal courts on a number of occasions.

WLF and AEF recognize that state and local governments have a strong interest in regulating usage of their streets and sidewalks, in order to protect the public health and safety and to promote a clean and aesthetically pleasing environment. They further recognize that such regulation is not rendered illegitimate simply because it may inhibit citizens' efforts to express themselves.

WLF and AEF nonetheless are extremely concerned that state and local governments, in the exercise of their police powers, not pick and choose among the types of lawful expression they will encourage and those they will subject to strict regulation. All truthful, lawful speech is entitled to substantial First Amendment protection and should not be singled out for regulation simply because government officials deem its subject matter to be of lesser importance. If governments are interested in promoting aesthetic values by reducing the number of signs in a community, they should adopt sign limits that apply equally to all signs without regard to their content.

*Amici* submit this brief in support of Respondent with the written consent of all parties. The written consents are on file with the Clerk of the Court.

### STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case set forth in Respondent's brief.

In brief, Petitioner City of Ladue, Missouri on February 25, 1991 adopted an amended ordinance (the "Ordinance") designed to restrict severely the placement of signs within the city. See Joint Appendix ("J.A.") 116-131. The Ordinance limits placement of commercial signs to commercially zoned and industrial zoned areas of the city (which comprise about 3% of Ladue's total area). The Ordinance bans noncommercial signs throughout the city (even in commercial zones where commercial signs are permitted), except that nine categories of signs are explicitly exempted from the ban -- based on the content of such signs.<sup>1</sup>

During American involvement in the Persian Gulf War in early 1991, Respondent Margaret Gilleo placed an 8.5" x 11" sign on the inside of a second-story window of her house that read, "For Peace in the Gulf." In response, City of Ladue officials informed her that the sign violated the Ordinance's anti-sign provisions. Ms. Gilleo thereafter sought a federal court injunction against enforcement of the ordinance.

---

<sup>1</sup> The following signs are permitted throughout the city: municipal signs; subdivision and residence identification signs; road signs and driveway signs for danger, direction, or identification; health inspection signs; church, religious institution, and school signs announcing names, services, activities, or function (limited by number); identification signs for nonprofit organizations; signs identifying the location of public transportation stops; ground signs advertising the sale or rental of property; and signs identifying safety hazards. J.A. 121-122.

A "sign" is defined by the Ordinance as "[a] name, word, letter, writing, identification, description, or illustration which is erected, placed upon, affixed to, painted or represented upon a building or structure, or any part thereof, or in any manner upon a parcel of land or lot, and which publicizes an object, product, place, activity, opinion, person, institution, organization, or place of business, or which is used to advertise or promote the interests of any person." J.A. 120. In its brief, Ladue contends that a "flag" (defined by Ladue in its brief as a "typically square or rectangular shaped" object made of "fabric material") does not come within the Ordinance's definition of a "sign." Pet. Br. 39.

On October 1, 1991, the United States District Court for the Eastern District of Missouri granted Ms. Gilleo's motion for summary judgment and permanently enjoined Petitioners (hereinafter "Ladue") from enforcing significant portions of the Ordinance. Petition Appendix ("Pet. App.") 20a-21a. The United States Court of Appeals for the Eighth Circuit affirmed the injunction in a decision issued on February 22, 1993. Pet. App. 1a-8a. This Court granted Ladue's petition for a writ of certiorari on October 5, 1993.

### SUMMARY OF ARGUMENT

Ladue's anti-sign Ordinance cannot qualify as a reasonable "time, place, or manner" restriction on speech, because it is not content-neutral. It is uncontested that Ladue distinguishes between permissible and impermissible signs based solely on sign content. Although Ladue contends that prohibited signs are banned solely because of their tendency to proliferate and not because of their content, speech regulation does not qualify as content-neutral simply because the regulator claims to have a pure heart. The Ordinance cannot qualify as content-neutral because it cannot be justified "without reference" to the content of the signs that it purports to regulate. Moreover, the evidence is overwhelming that Ladue's desire to ban political signs such as Ms. Gilleo's is directly related to the content of such signs: Ladue dislikes political signs because of their "tendency to proliferate," and it is their content that gives them whatever tendency they may have to proliferate.

The Ordinance cannot be upheld under a "time, place, or manner" analysis for the additional reason that it purports to regulate speech by a homeowner on her own property. The "time, place, or manner" doctrine is generally invoked to justify regulation of speech in public forums only. An individual's compelling interest in being permitted to speak freely on his own property counsels against upholding the Ordinance under any sort of time,

place, or manner rationale. That interest should be sufficient to trump any interest that a city may claim in promoting aesthetics, at least in the absence of evidence that the sign ordinance is part of an overriding scheme to preserve historically significant properties in their original state.

The Ordinance also cannot be upheld under the "secondary effects" doctrine, which can be invoked to uphold content-based regulation of speech where the regulated speech has undesirable secondary effects. The "secondary effects" doctrine may not be invoked where, as here, the secondary effects of the regulated speech are virtually identical to the secondary effects of similarly situated unregulated speech. Here, prohibited signs and permitted signs contribute to "visual clutter" to the same degree.

Because the "time, place, or manner" doctrine and the "secondary effects" doctrine are inapplicable to this case, Ladue can prevail in this action only by demonstrating a compelling interest in its sign regulations. Ladue cannot make such a showing. Indeed, Ladue's interest in continuation of its content-based sign restrictions is minimal, given that a content-neutral alternative is readily at hand: Ladue could adopt a content-neutral limitation on the total number of signs that may be posted at any residence or subdivision.

### ARGUMENT

#### I. THE ORDINANCE MAY NOT BE DEFENDED AS A "TIME, PLACE, OR MANNER" RESTRICTION ON SPEECH, BECAUSE IT IS NOT CONTENT-NEUTRAL

This Court has repeatedly recognized that signs are an important medium of expression. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981)(plurality) ("[t]he outdoor sign or symbol is a venerable medium for expressing political, social and



commercial ideas"). As such, they are entitled to substantial protection under the First Amendment, which severely restricts the power of governments to regulate "protected" speech (i.e., all speech that does not fall into those few categories of expression -- such as obscenity or defamation -- deemed unworthy of significant First Amendment protection).

One limited category of permissible speech restriction which the Court has recognized is the "time, place, or manner" restriction:

[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."

*Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989)(quoting *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984)).

Regardless whether Ladue could demonstrate that it can meet the second and third requirements of a valid "time, place, or manner" restriction on speech (narrow tailoring and alternative channels for communication), Ladue clearly cannot meet the content-neutrality requirement. The Ordinance is not content-neutral under any commonsense definition of that term: it prohibits some signs and permits others based solely on their content. Accordingly, the Ordinance cannot be upheld as a valid "time, place, or manner" speech restriction. Indeed, this Court has held repeatedly that content-based restrictions on speech are "presumptively invalid." *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538, 2542 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991).

#### A. The "Time, Place, or Manner" Doctrine Is of Limited Applicability in Cases Where, as Here, the Government is Attempting to Restrict Speech on Private Property

Before addressing Ladue's contention that its Ordinance really is content-neutral, amici wish to question the extent to which the "time, place, or manner" doctrine is applicable to speech restrictions of this type. Amici submit that when, as here, the government is seeking to restrict speech on the speaker's own residential property, courts should be extremely reluctant to uphold the restriction under a "time, place, or manner" rationale.

The "time, place, or manner" doctrine traditionally has been applied to government restrictions on speech taking place on public property that has been dedicated as a "public forum." *Ward*, 109 S. Ct. at 2753. While it has on occasion been applied to uphold restrictions on speech on private property (see, e.g., *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991)), such application has generally been limited to cases in which the expression being restricted was sexually explicit "adult" entertainment. The Court has recognized that the expressive content of "adult" entertainment such as nude dancing is sufficiently minimal that it is only "marginally" within the "outer perimeters of the First Amendment." *Id.* at 2460.<sup>2</sup>

Outside of the realm of "adult" entertainment, there is good reason to exercise extreme caution before applying the "time, place, or manner" doctrine to restrictions on speech on private property -- particularly where the property in question is the speaker's residence. The right

<sup>2</sup> Indeed, in support of its assertion that the doctrine was applicable to restrictions on expression on private property, the Court in *Glen Theatre* stated that the doctrine had been applied to such restrictions "on at least one occasion" and cited as its precedent *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). *Glen Theatre*, 111 S. Ct. at 2460 (plurality opinion). Both *Glen Theatre* and *Renton* involved government attempts to regulate "adult" entertainment.

of an individual to act freely in conducting affairs at his own residence is one of the most cherished rights in our society. The Court has "often remarked on the unique nature of the home, 'the last citadel of the tired, the weary, and the sick.'" *Frisby v. Schultz*, 487 U.S. 474, 484 (1988)(quoting *Gregory v. Chicago*, 394 U.S. 111, 125 (1969)(Black, J., concurring). See *Carey v. Brown*, 447 U.S. 455, 472 (1980) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."). If it is to mean anything, protecting the "well-being . . . of the home" must include the right to speak freely from one's home.

Indeed, "time, place, or manner" restrictions on speech have most often been upheld on the grounds that they are designed to protect homeowners from intrusions on their property rights. See, e.g., *Ward*, 109 S. Ct. at 2756 (regulation of noise from rock concerts in a public forum upheld where designed to protect adjacent residents from unwelcome noise; the government's interest in noise abatement is at its "greatest" when designed to protect the "privacy of the home"); *Frisby v. Schultz*, 487 U.S. at 484-485. Where, as here, there is no record evidence that the sign displayed on one residence is visible from any other residence, the "privacy of the home" argument tilts decidedly against upholding a speech restriction based on a "time, place, or manner" argument.<sup>3</sup>

Nor do many of the arguments favoring application of the "time, place, or manner" doctrine to regulation of speech in public forums have any relevance to regulation of speech at one's home. For example, in upholding (under a "time, place, or manner" rationale) the right of a

<sup>3</sup> In *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), the Court held that an ordinance prohibiting the display of "for sale" signs on private residences could not be upheld based on a desire to protect residents from exposure to signs, because there was no evidence that such signs "intrude[d] on the privacy of the home." *Linmark*, 431 U.S. at 94.

city to ban the posting of signs on public property, the Court noted that such signs are unattended after posting - and the deterioration of signs that inevitably accompanies such inattention is a particular source of urban blight. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 809 (1984). In contrast, one can be reasonably confident that a sign posted on a personal residence will be posted in a tasteful manner and will be well maintained, because no one has a greater interest than the homeowner in maintaining the attractiveness of her property in order to maximize its value.<sup>4</sup> See *id.* at 811 ("private property owners' esthetic concerns will keep the posting of signs on their property within reasonable bounds").

In sum, when content-neutral restrictions on protected speech are aimed at speech on personal residences, there is little reason to show deference to such restrictions by testing them under the relatively inexact requirements reserved for "time, place, or manner" speech restrictions. Rather, such restrictions on protected speech should be upheld only if their sponsor can demonstrate a compelling interest in the restrictions. In any event, the Court need not reach the issue of the applicability of the "time, place, or manner" doctrine to this case, since (as demonstrated below) the Ordinance so clearly is not content-neutral.

#### **B. Ladue's Differentiation Between Signs Based on Their "Tendency to Proliferate" Is Not a Content-Neutral Approach**

Even though the Ordinance on its face distinguishes between permissible and impermissible signs based on sign

<sup>4</sup> Indeed, in December 1990, when Respondent Gilleo discovered that signs she placed on her lawn had been vandalized, she not only righted the signs but also took the trouble to report the vandalism to the police in order to prevent its recurrence. See Pet. App. 22a-23a.



content,<sup>5</sup> Ladue argues that the Ordinance nonetheless qualifies as content-neutral for purposes of "time, place, or manner" analysis. Ladue argues that its sole concern is limiting the aggregate number of signs in the city, and that it distinguishes between permissible and impermissible signs based on whether they tend to proliferate -- with those having that tendency being totally banned. Pet. Br. 18-19. Ladue bases its content-neutrality claim on *Ward*, which stated:

A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. . . . Government regulation of expressive activity is content-neutral so long as it is "justified without reference to the content of the regulated speech."

*Ward*, 109 S. Ct. at 2754 (quoting *Community for Creative Non-Violence*, 468 U.S. at 293). Ladue argues that the Ordinance's distinction between permissible and impermissible signs is "justified" based not the content of the signs in question but rather on whether those signs tend to proliferate.

Ladue has misconstrued *Ward*. Ladue interprets *Ward* as though the critical language read: "[A] justification based on some attribute of the regulated speech other than the message it conveys." That reading of *Ward* totally ignores the words "without reference"; *Ward* limits content-neutral status to those speech limitations that make absolutely no reference to the subject matter of the speech being regulated. Since the Ordinance undeniably makes

<sup>5</sup> The Ordinance allows posting of signs that address any one of ten enumerated subject matters but prohibits all others. J.A. 121-122. Ladue does not contend that the ten categories of signs excepted from the general sign prohibition are so insignificant as to amount to a *de minimis* deviation from content neutrality. Rather, it argues that signs addressing the ten enumerated subject matters have been excepted for reasons unrelated to their content.

reference to subject-matter content of signs in distinguishing permissible from impermissible signs, it cannot qualify as "content-neutral" under *Ward*.

Certainly, the facts in *Ward* are readily distinguishable from this case. *Ward* involved an attempt by New York City to regulate sound amplification by all users of a bandshell located in Central Park. The regulations applied without regard to the content of the sound being amplified. The Court held that the regulations qualified as "content-neutral" for purposes of "time, place, or manner" analysis even though they may have had greater incidental effects on some bandshell users than on others. *Id.*<sup>6</sup> In contrast, Ladue does not apply the Ordinance to all signs, but rather only to those that do not fall within one of the ten enumerated subject-matter exceptions.<sup>7</sup> *Taxpayers for Vincent* is similarly distinguishable; the public-property sign-posting prohibition upheld in that case applied to all signs without regard to content.<sup>8</sup> The plaintiffs had not claimed that the challenged ordinance had singled out for prohibition the signs they wished to post based on their

<sup>6</sup> Indeed, even the dissenting justices agreed that the sound amplification regulations "indisputably are content-neutral as they apply to all Bandshell users irrespective of the message of their music." *Ward*, 109 S. Ct. at 2761 (Marshall, J., dissenting).

<sup>7</sup> *Ward* would have been analogous to the present case if New York City had responded to citizen complaints regarding loud rock-and-roll concerts by regulating sound amplification at rock-and-roll concerts but not at other musical performances at the bandshell. Such a regulation would not have met the Court's requirements for content-neutrality, because even though it would have been directed at the only type of performances shown to have elicited complaints, it could not be said to be justified "without reference" to the content of the regulated speech.

<sup>8</sup> The Court stated pointedly in *Taxpayers for Vincent* that the relief sought by the plaintiffs (an exception from the sign-posting prohibition for political signs posted during the period immediately preceding an election) could constitute "constitutionally forbidden content discrimination" against other types of signs. *Taxpayers for Vincent*, 466 U.S. at 816.



content, but merely that the prohibition had had an adverse effect on their ability to communicate. *Taxpayers for Vincent*, 466 U.S. at 808-817.

Ladue argues that the Ordinance should be considered "content neutral" because there is no evidence to suggest that the city is in any way basing its actions on a disagreement with what Respondent Gilleo has to say; Ladue states that it would object just as strongly to a sign that read, "Wage War in the Gulf -- Kill Saddam Hussein." Pet. Br. 2. Ladue's argument is without merit, for at least four reasons.

First, attempts to suppress discussion of entire topics violate content-neutrality principles just as surely as do attempts to suppress a particular viewpoint. *Burson v. Freeman*, 112 S. Ct. 1846, 1850 (1992); *Metromedia*, 453 U.S. at 518-519 (plurality).

Second, this Court has explicitly rejected the notion that regulation of speech on a specified topic is not suspect under the First Amendment if the regulation is not based on hostility toward discussion of the topic. In *Simon & Schuster*, the Court held:

The Board next argues that discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas. This assertion is incorrect; our cases have consistently held that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983). *Simon & Schuster* need adduce "no evidence of an improper censorial motive." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. [221,] 228 [1987]. As we concluded in *Minneapolis Star*, "[w]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly

the exercise of rights protected by the First Amendment." 460 U.S., at 592.

*Simon & Schuster*, 112 S. Ct. at 509.

Third, content neutrality requires not only that disfavored speech not be suppressed but also that favored speech not be given special advantages. It matters not that Ladue views Ms. Gilleo's sign as no worse than the vast majority of signs that might be displayed in the city; so long as Ladue has chosen to provide special advantages to signs discussing certain topics (e.g., real estate "for sale" and "for rent" signs),<sup>9</sup> Ladue is not exercising content neutrality unless it gives the same advantages to identical signs discussing other topics.

*Carey v. Brown* well illustrates that point. In *Carey*, the Court struck down a law that prohibited residential picketing but that made an exception for labor picketing. There was no indication that the state legislature harbored hostility toward the subject matter of nonlabor picketing; indeed the mere idea of such a broad-based hostility is absurd, since the vast majority of topics of public discussion concern nonlabor issues. Nonetheless, the Court held that the state impermissibly deviated from content-neutral ideals when it decided to permit picketing on one favored topic without permitting picketing on other topics. *Carey*, 447 U.S. at 465-469.<sup>10</sup>

<sup>9</sup> Ladue suggests that the only reason that it permits "for sale" and "for rent" signs is that it is required to do so under Missouri law. That argument cannot excuse Ladue's deviation from content-neutrality in its suppression of signs; Missouri certainly never required Ladue to impose a ban on residential signs. If Ladue is serious about adopting a ban on residential signs that can qualify as "content-neutral," its proper course is to begin by petitioning the Missouri legislature to repeal the law in question.

<sup>10</sup> This is not to say that Ladue must choose between banning all signs or lifting all sign restrictions. To the contrary, Ladue is free to adopt content-neutral regulations, such as limitations on the number of  
(continued...)

Fourth, Ladue is simply wrong in claiming that there is no evidence that it seeks to prohibit Ms. Gilleo's sign and other political signs due to an animus against them. To the contrary, the evidence is overwhelming that Ladue's desire to ban political signs is directly related to the content of such signs. Ladue has adduced evidence that political signs tend to proliferate more than other types of signs in the absence of restrictions. See, e.g., J.A. 154-155. But signs tend to proliferate precisely because of their content: proliferation is a sure indication that the ideas being expressed through such signs are popular ideas that many people wish to express. Accordingly, a ban on signs that "tend to proliferate"<sup>10</sup> is another name for a ban on signs expressing popular ideas. In other words, Ladue is openly admitting that it dislikes political signs because of their subject matter -- not because of a dislike of things political but because it fears that political signs (due to the

<sup>10</sup> (...continued)

signs per lot. Moreover, Ladue is free to adopt non-content-neutral regulations to the extent that it can articulate compelling reasons for doing so. *Burson* demonstrates that the Court is receptive to arguments that a state actor has a compelling reason for engaging in content-based speech restrictions. *Burson*, 112 S. Ct. at 1851-1858 (Court applies strict scrutiny but nonetheless upholds content-based restriction on speech near polling places). Ladue might well be able to demonstrate that safety concerns provide it with a compelling interest in permitting road signs as an exception to a general sign ban.

<sup>11</sup> We find somewhat comical Ladue's repeated reference to signs that "do not proliferate" or "tend to proliferate." Such phrasing suggests that signs have a life of their own and that some signs, if left unchecked, will reproduce of their own volition. The Court should not permit such phrasing to obscure the fact that no sign is posted unless an individual wishing to convey an idea chooses to post it. Thus, signs that can be said to "tend to proliferate" are precisely those types of signs that address issues that the general public cares most deeply about. It makes no sense to suggest that lesser degrees of First Amendment protection should be afforded to discussion of precisely those issues that are of greatest public interest.

popularity of their subject matter) will proliferate and thereby offend aesthetic sensibilities.<sup>12</sup>

Ladue argues finally that the court of appeals erred in denying the Ordinance "content-neutral" status based solely on the fact that the Ordinance in certain instances favors commercial speech over noncommercial speech.<sup>13</sup> Although conceding that *Metromedia's* plurality opinion lends strong support to the court of appeals's position, Ladue argues that that opinion is no longer good law after *Discovery Network*, which (according to Ladue) held that courts should not place undue emphasis on the distinctions between noncommercial and commercial speech. Pet. Br. 33-34. Ladue's argument is off the mark. Regardless whether, after *Discovery Network*, Ladue would be justified in affording a lesser degree of protection to commercial signs than to noncommercial signs, nothing in *Discovery Network* licenses a municipality to discriminate in

<sup>12</sup> We note in passing that Ladue has produced virtually no evidence that political signs tend to proliferate on residential property if left unrestricted. Ladue's experts who spoke of proliferation of political signs in other jurisdiction all referred at least in part to posting of signs on public property. See, e.g., J.A. 154-155, 197. An individual homeowner's strong interest in maintaining the value of his/her property provides a powerful incentive for ensuring that signs will not be posted on residential property in a cluttered manner. Indeed, then Justice Rehnquist, in his *Metromedia* dissent, indicated his belief that permitting political signs on residential property in the period immediately prior to a political campaign is likely to have only a limited effect on the aesthetics of a city. *Metromedia*, 453 U.S. at 570 (Rehnquist, J., dissenting). Given the seasonal nature of most political signs, there is serious reason to doubt that they proliferate more widely than real estate "for sale" signs -- which are excepted from the Ordinance's general ban because of their supposed tendency not to proliferate but which can be found in Ladue on a year-round basis.

<sup>13</sup> Commercial signs are generally permitted in the 3% of Ladue that is zoned industrial or commercial, while noncommercial signs of the type that Ms. Gilleo attempted to display are permitted nowhere in the city. Also, at least two specific types of commercial signs -- "for sale" and "for rent" signs -- are permitted throughout the city.



favor of commercial speech on the basis of its content -- as Ladue has done in this case.

In sum, Ladue cannot escape the fact that in banning most signs but excepting signs that address any one of ten enumerated subject matters, the Ordinance is engaging in content-based discrimination. As such, it may not be defended as a reasonable "time, place, or manner" restriction on speech.

### C. Signs on Residential Houses Are Not Comparable to the "Billboards" Being Regulated in *Metromedia*

Ladue and its supporting *amici* have analyzed the Ordinance as though it were governed by the law of "billboards" as established in *Metromedia* and elsewhere. In fact, the 8.5" x 11" window sign at issue in this case bears scant resemblance to the billboards at issue in *Metromedia*. *Amici* WLF and AEF respectfully submit that the absence of content-neutrality in the Ordinance becomes significantly clearer if one focuses on the unique aspects of residential window signs as a medium of expression.

The Court emphasized in *Metromedia* that its constitutional analysis of the extent to which a government may regulate expressive activity varies considerably depending on the medium of expression sought to be employed. The Court said:

Each method of communicating ideas is "a law unto itself" and that law must reflect the "differing natures, values, abuses, and dangers" of each method. We deal here with the law of billboards.

*Metromedia*, 453 U.S. at 501 (plurality)(quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949)).

Moreover, the Court had a very narrowly defined concept in mind when it was discussing "billboards" in *Metromedia*. The San Diego ordinance at issue in that case sought to regulate "outdoor advertising display signs," defined by the ordinance as "rigidly assembled sign[s], display[s], or device[s] permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public." *Id.* at 541 n.3 (Stevens, J., dissenting). Not included within the definition were signs "such as . . . a small sign placed in one's front yard proclaiming a political or religious message." *Id.* at 545 n.11 (Stevens, J., dissenting). In other words, signs such as the sign placed by Ms. Gilleo in her window -- which was neither "permanently attached" to her house nor "rigidly assembled" -- were not at issue when the Court addressed the "law of billboards" (*id.* at 501) in *Metromedia*.

Placing a sign directly on one's personal residence has much more in common (as a medium of expression) with building a house with a distinctive architectural design than with erecting a permanent billboard structure that abuts a major road. A sign placed on one's personal residence is no more intrusive on the aesthetic sensibilities of passersby than the personal residence itself (because it cannot be larger than the residence), and is likely to be far less intrusive than a sign erected in the form of a free-standing billboard.

It is incontestable that numerous design features of every house have expressive content. For example, virtually every homebuilder designs his or her homes with some artistic statement in mind; a plastic reindeer or outdoor Christmas lights attached to a house most likely are intended to convey a message of warm tidings during the holiday season; religious items such as a mezuzah placed on a door post convey religious sentiments. For purposes of First Amendment analysis, there is no reason to treat signs placed on a personal residence any



differently from other expressive features of the residence that are visible to passersby.

Accordingly, a city is not abiding by concepts of content-neutrality if it prohibits placement of signs on personal residences, unless it also closely regulates all ~~aspects of house design.~~<sup>14</sup> There is no evidence in this case that Ladue attempts to exert any such control of architectural design in the city. Landowners in Ladue apparently are free to express themselves as they choose when it comes to designing their personal residences -- provided only that such expression not be in the form of written words. For all practical purposes, such discrimination against the written word amounts to content-based discrimination, because so many ideas cannot adequately be expressed nonverbally.

Ladue's most likely would respond along the following lines: it finds a Tudor house design to be more aesthetically pleasing than the same house design interrupted by a sign containing several words -- and it ought to be permitted to define and pursue its own aesthetic goals. But any such response serves to highlight the dangers of granting communities the unfettered right to regulate expressive activities based solely on aesthetic goals. As Justice Brennan noted, "[T]he inherent subjectivity of aesthetic judgments makes it all too easy for the government to fashion its justification for a law in a manner that impairs the ability of a reviewing court meaningfully to . . . determin[e] whether the actual objective is related to the suppression of speech." *Taxpayers for Vincent*, 466 U.S. at 822 (Brennan, J., dissenting). See also *Metromedia*, 453 U.S. at 510 (plurality) ("esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be

<sup>14</sup> Thus, a community such as Williamsburg, Virginia might be said to be acting in a content-neutral fashion if (for reasons of historical accuracy) it were to ban placement of signs on personal houses, provided that it closely regulated all home construction in order to preserve historical accuracy in architectural design.

carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose"). A prohibition against signs on personal residences would not amount to content-based discrimination against protected speech if it were based on a desire to eliminate "visual clutter," but it would amount to content-based discrimination if it were based on an assertion that the contents of the signs were aesthetically displeasing. One could well imagine that the latter rationale motivates many sign bans -- suburbanites often seek an environment where they can put the harsh realities of commercial and political life out of their minds. But if communities can defend sign bans based merely on a claim that they serve "aesthetic goals" which are in turn defined as requiring the elimination of the disfavored signs, reviewing courts will have no means of ascertaining whether expressive activity is being suppressed on the basis of content.

The Court said in *Metromedia* that freestanding billboards as defined in that case raised sufficient "visual clutter" concerns, that it would assume that San Diego's expressed aesthetic concerns over the proliferation of billboards did not amount to disapproval of the messages conveyed by billboards. Similarly, in *Taxpayers for Vincent*, the court recognized that the "visual clutter" problems arising from permitting unrestricted posting of political signs on public property were sufficiently large so as to negate any inference of content-based discrimination. But a homeowner's vested interest in maintaining the value and attractiveness of his/her own home negates any realistic possibility that "visual clutter" will be a serious problem if communities do not control placement of signs on private residences. Accordingly, the Court should be unwilling to indulge a community's inherently unprovable assertion that it seeks to ban most signs on personal residences for aesthetic reasons unrelated to efforts to suppress ideas commonly conveyed by signs. Unless a community can demonstrate a Williamsburg-like commitment to regulating all aspects of residential housing design, the Court should deem all aesthetics-based efforts to ban signs on residential housing to constitute content-

based discrimination against the messages conveyed by such signs.

In sum, *amici* respectfully suggest that aesthetic considerations can virtually never constitute a content-neutral ground for prohibiting placement of a sign directly on one's personal residence. Accordingly, the Ordinance would not qualify as content-neutral (for purposes of "time, place, or manner" analysis) even if Ladue had not included ten broad exceptions to the general ban on signs.

## II. THE "SECONDARY EFFECTS" TEST IS INAPPLICABLE TO THIS CASE

Ladue argues alternatively that even if the Ordinance is found not to be content-neutral, it can be sustained under the "secondary effects" test -- a test that accepts a seemingly content-based regulation as content-neutral provided that the regulation was adopted solely for the purpose of eliminating an undesired "secondary effect" of the speech being regulated. Pet. Br. 34-35. Ladue argues that the Ordinance survives the "secondary effects" test because it was adopted not for the purpose of suppressing the subject matter of signs, but rather solely for the purpose of eliminating the "visual blight" caused by the proliferation of signs. *Id.*

Ladue's resort to the "secondary effects" doctrine is unavailing, for several reasons. First, this "rarely used" doctrine (*R.A.V.*, 112 S. Ct. at 2557 n.11 (White, J., concurring)) has never been invoked to uphold a regulation of expressive activity outside of the area of "adult" entertainment. See *Renton*, 475 U.S. at 49-50. In light of the lesser degree of First Amendment protection normally afforded to "adult" entertainment, there is little warrant for extending the fiction underlying the "secondary effects" doctrine (that content-based regulation should be deemed content-neutral when the principal justification for regulating speech is to curb some secondary effect of the speech) to other forms of speech that are fully protected under the First Amendment. In any event, *R.A.V.* held

that the secondary effects doctrine is inapplicable when, as here, the alleged "secondary effects" consist of the reaction of the audience to the speech in question. *R.A.V.*, 112 S. Ct. at 2549.<sup>15</sup>

Second, in those cases in which the Court has invoked the "secondary effects" doctrine to uphold a regulation of a category of speech on the basis of content, the regulation did not amount to a total ban on that category of speech. Thus, in both *Renton* and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the Court took great pains to note that the regulations at issue (both of which involved controls on the siting of "adult" movie theaters) still allowed for the operation of such theaters. In contrast, Ladue's Ordinance mandates an absolute, city-wide ban on signs conveying specified messages. There is serious question whether the "secondary effects" doctrine is properly invoked in order to ban altogether certain modes of expressing views on disfavored topics. See, e.g., *R.A.V.*, 112 S. Ct. at 2549 (questioning whether "an ordinance that completely proscribes, rather than merely regulates, a specified category of speech can ever be considered to be directed only to the secondary effects of such speech").

Third and most importantly, the Court has limited application of the "secondary effects" doctrine to those cases in which the expression being regulated has "markedly different effects upon [its] surroundings" than does similarly situated unregulated speech. *Renton*, 475 U.S. at 49. Thus, in *Discovery Network*, the Court refused to invoke the "secondary effects" doctrine in order to uphold a Cincinnati ordinance that banned commercial newsracks from city sidewalks but permitted the newsracks

<sup>15</sup> There is no basis for contending that a proliferation of signs creates some objectively verifiable aesthetic concerns. Beauty is solely in the eye of the beholder. There is no justification for aesthetic concern over sign proliferation unless Ladue residents who view the signs find them distasteful -- and *R.A.V.* teaches that such reactions are not the type of "secondary effects" referred to in *Renton*.

of general-circulation newspapers to remain in place -- because "[i]n contrast to the speech at issue in *Renton*, there are no secondary effects attributable to respondent publishers' newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks." *Discovery Network*, 113 S. Ct. at 1517.

Ladue cannot seriously contend that the secondary effects of a political sign such as Ms. Gilleo's are more severe than the secondary effects of a "for sale" sign or any other type of sign permitted under the Ordinance. Clearly, one "for sale" sign causes the same amount of "visual clutter" as one "For Peace in the Gulf" sign. Ladue argues that in the absence of sign regulation, political signs posted on private residences would far outnumber "for sale" signs. But such a "tendency to proliferate" is not an effect of political signs themselves -- since, unlike an "adult" movie theater (which attracts unsavory elements), the posting of a political sign does not attract other signs. Rather, if repeal of all sign regulation were to lead to the posting of a large number of political signs, that would merely be an indication of the preferences of Ladue's citizens. Moreover, since Ladue can so easily avoid having to resort to content-based regulation and still achieve its desired aesthetic objectives (by, *e.g.*, adopting a content-neutral limitation on the total number of signs that may be posted at any residence or subdivision), there is considerable reason to question Ladue's protestations that its ban on political signs is designed solely to control the secondary effects of such signs. See *R.A.V.*, 112 S. Ct. at 2550 ("The existence of adequate content-neutral alternatives thus 'undercuts significantly' any defense of such a statute [that discriminates against speech on the basis of content]") (quoting *Boos v. Barry*, 485 U.S. 312, 329 (1988)).

In sum, the "secondary effects" test is wholly inapplicable to this case. Accordingly, the Ordinance cannot withstand First Amendment analysis, because it is defensible under neither the "time, place, or manner" doctrine nor the "secondary effects" doctrine, and Ladue

has not asserted any compelling interest in regulating signs in a content-based manner.

## CONCLUSION

*Amici curiae* Washington Legal Foundation and Allied Educational Foundation respectfully request that the judgment below be affirmed.

Respectfully submitted,

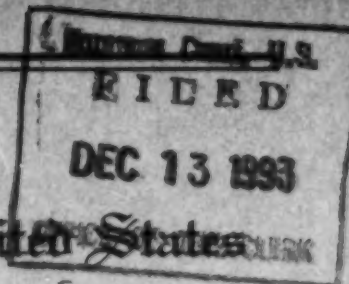
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December 14, 1993





IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

CITY OF LADUE, *et al.*,

*Petitioners,*

—v.—

MARGARET P. GILLES,

*Respondent.*

ON WRIT OF *CERTIORARI* TO THE UNITED STATES  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF AMICUS CURIAE OF THE ASSOCIATION  
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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1993

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CITY OF LADUE, *et al.*,

Petitioners,

-v.-

MARGARET P. GILLES,

Respondent.

---

ON WRIT OF *CERTIORARI* TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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INTEREST OF *AMICUS*

The Association of National Advertisers, Inc., (A.N.A.) respectfully submits this brief *amicus curiae* in support of respondent. Letters of consent to its filing have been lodged with the Clerk of the Court.

The Association of National Advertisers, Inc., the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. With more than 2,000 subsidiaries, divisions and operating units, A.N.A. members market a kaleidoscopic array of goods and services and account for almost 80% of the nation's annual national and regional advertising expenditures. As the nation's principal community of

commercial speakers, A.N.A. has long been committed to the advancement of commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.

Ordinarily, as in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. \_\_\_, 113 S.Ct. 1505 (1993), A.N.A. has appeared as *amicus curiae* to urge that commercial speech be accorded an appropriate level of free speech protection. In this case, the City of Ladue has reversed the usual order of speech regulation by treating commercial speech more favorably than non-commercial communication. While A.N.A. applauds Ladue's recognition of the importance of commercial speech, A.N.A. continues to believe that it is constitutionally impermissible for government to differentiate among categories of speech on the basis of content in the absence of an overwhelming social need. Moreover, where, as here, a municipality seeks to eliminate a long-established and pervasive means of communication -- the display of signs and symbols on private property -- in the name of aesthetics, the municipality threatens both commercial and non-commercial speech. Accordingly, A.N.A. respectfully submits this brief *amicus curiae* in support of respondent.

#### STATEMENT OF THE CASE

On December 8, 1990, respondent, a resident of the City of Ladue, placed a small sign on her front lawn reading "Say No to War in the Persian Gulf/Call Congress Now." Vandals immediately destroyed the sign. On December 10, respondent placed an identical sign on her lawn. (A picture of respondent's second sign appears in the Joint Appendix, hereafter J.A., at 194.) When her sign was again destroyed by vandals, respondent sought assistance from the Ladue Police Department. She was informed that her sign violated Ladue's anti-sign ordinance, which required a permit for the display of a sign. After unsuccessfully seeking a permit

from the Chief of Police and the Town Clerk, respondent appeared before the Ladue City Council on December 17, 1990 to request a permit. The permit was denied. On December 20, 1990, respondent commenced this litigation, seeking injunctive relief against the Ladue ordinance. On January 7, 1991, the district court granted preliminary injunctive relief. On January 21, 1991, Ladue enacted its current anti-sign ordinance. J.A.116-31. Respondent, who had replaced her lawn sign with an 8.5 x 11 inch sign in her second floor window reading "For Peace in the Gulf," was informed that her window sign violated the current Ladue ordinance. (A picture of the sign in respondent's window appears at J.A. 195.) After a hearing, the district court granted summary judgment and injunctive relief, holding Ladue's current ordinance unconstitutional on its face. *Gilleo v. City of Ladue*, 774 F.Supp. 1559-68 (E.D.Mo. 1991). The Eighth Circuit affirmed. 986 F.2d 1180 (8th Cir. 1993). This Court granted *certiorari* on October 4, 1993.

#### SUMMARY OF ARGUMENT

The display of posters, placards and symbols is among the oldest and most pervasive forms of human communication. Nevertheless, the City of Ladue, in the name of aesthetics, seeks to ban virtually all non-commercial signs and symbols, even when they are displayed on private residential property. Such an exercise in mass censorship violates four fundamental constitutional precepts. First, a quixotic effort to ban the display of virtually all private signs and symbols from a community inevitably invites viewpoint-driven judgments about whether, when and how to enforce it. *Houston v. Hill*, 482 U.S. 451 (1987). Given the foibles of human nature, the limits of municipal resources and the pervasive presence of written communication through signs and symbols in our society, a purported ban on all signs and symbols must inevitably degenerate into a viewpoint-

driven series of judgments over the administration and enforcement of the ban. *See infra*, Point I at pp.7-11.

Second, Ladue's asserted interest in aesthetics cannot justify a total ban on a medium of communication as long-established and pervasive as the display of signs and symbols on private property. Ladue's effort to justify its total ban on aesthetic grounds fails on at least four levels:

(a) an interest in aesthetics is not of sufficient magnitude to warrant the complete elimination (as opposed to regulation) of a long-established and pervasive medium of communication. *Schneider v. New Jersey*, 308 U.S. 147 (1939). *See infra*, Point II(A) at pp.13-17;

(b) no showing has been made that the sign in question poses a genuine danger to any rational conception of aesthetics. At most, Ladue cites wholly speculative fears of a "risk" that unsightly signs will "proliferate" uncontrollably if any signs are permitted at all. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *See infra*, Point II(B) at pp.17-20;

(c) obvious less drastic means exist to guard against Ladue's bogeyman of uncontrolled sign proliferation. Ladue has made absolutely no effort to show that limits on the size, duration, format and number of signs would be ineffective in guarding against any rational conception of aesthetic degradation. *Sable Communications v. FCC*, 492 U.S. 115 (1989). *See infra*, Point II(C) at pp.20-21; and

(d) even if Ladue's effort to stamp out an entire medium of communication is incorrectly analyzed as a mere "time, place or manner" regulation, it unquestionably fails the "narrow tailoring" test imposed in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). More importantly, though,

Ladue's effort to ban a long-established and pervasive medium of communication exercises far too drastic an impact on the free flow of ideas to qualify for relaxed scrutiny as a time, place or manner rule. Banning books to save trees would not qualify as a time, place or manner rule. Neither does banning virtually all signs in the name of aesthetics. *See infra*, Point II(D) at pp. 21-23.

Third, Ladue's ordinance impermissibly discriminates on the basis of content by explicitly permitting commercial "For Sale" and "For Rent" signs, while forbidding identical signs containing non-commercial messages and by forbidding non-commercial messages in areas where commercial signs are freely permitted. The speculative assertion that commercial speech may be less likely to pose a threat to aesthetics because it is less likely to "proliferate" than its non-commercial cousin cannot justify such differential treatment of the two categories of speech. *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505. *See infra*, Point III at pp.24-26.

Finally, Ladue's ordinance impermissibly interferes with a property owner's right to use private property for communicative purposes. Whatever the State's power to regulate its own property, or property held for the common use of the public, the State must establish an overwhelming social need before overriding the combined effect of the two most important protections of human autonomy present in the Constitution -- free expression and private property. *Buckley v. Valeo*, 424 U.S. 1 (1976); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *FCC v. League of Women Voters*, 468 U.S. 364 (1984). When, as here, a municipality ignores both free expression and private property by attempting to ban the display of innocuous signs on a homeowner's lawn and on the inside of a homeowner's window, it enters the realm of Orwellian fantasy. *See infra*, Point IV at pp.26-28.



## ARGUMENT

The City of Ladue, in the name of community beautification, seeks to impose a flat ban on the display of virtually all private signs and symbols.<sup>1</sup> The extraordinary reach of Ladue's crusade to make its world safe from signs is demonstrated by the City's effort in this case to ban an 8.5 x 11 inch hand-lettered sign displayed in the second-floor front window of a resident's home reading "For Peace in the Gulf."<sup>2</sup>

Ladue's effort to eliminate the display of signs and symbols is unconstitutional on four grounds. First, a quixotic effort to ban virtually all communication by signs and symbols from the life of a community inevitably invites impermissible viewpoint-driven judgments about whether, when and how to enforce it. Second, Ladue's asserted interest in aesthetics and the maintenance of property values cannot justify a total ban on a significant and long-established medium of communication.

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<sup>1</sup> Ladue's current anti-sign ordinance was enacted on January 21, 1991, and amended on February 25, 1991. It is reproduced in its entirety in the Joint Appendix at pp.116-31. It flatly forbids most signs, with the exception of municipal signs; road and driveway danger signs; health inspection signs; signs for churches, religious institutions and schools; identification signs for not-for-profit organizations; public transportation signs; signs advertising the sale or rental of real property; commercial signs in areas zoned for commercial use; signs at filling stations; and signs identifying safety hazards.

The version of Ladue's anti-sign ordinance in effect at the commencement of this litigation is set forth in the Joint Appendix at pp. 26-37. It established a standardless permit system that clearly violated *Lovell v. Griffin*, 303 U.S. 444 (1938), and its substantial progeny. See *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). The petty tyranny of Ladue's viewpoint-driven refusal to grant a permit for respondent's original sign graphically illustrates the wisdom of this Court's repeated invalidation of standardless permit systems in the First Amendment area.

<sup>2</sup> Respondent's sign in her window was carefully covered by Ladue's current ordinance. See J.A.120-21.

Third, Ladue's ordinance impermissibly discriminates on the basis of content by permitting commercial "For Sale" signs, while forbidding identical signs containing non-commercial messages. Finally, Ladue's ordinance impermissibly interferes with a speaker's right to use private property for communicative purposes.

### I. LADUE'S ATTEMPT TO IMPOSE A TOTAL BAN ON THE DISPLAY OF VIRTUALLY ALL SIGNS AND SYMBOLS ON PRIVATE PROPERTY INEVITABLY INVITES VIEWPOINT-DRIVEN JUDGMENTS GOVERNING ITS ADMINISTRATION AND ENFORCEMENT

Censorship on the basis of viewpoint violates the core of the First Amendment. Stone, "Content Regulation and the First Amendment," 25 Wm. & Mary L.Rev. 189 (1983); Karst, "Equality as a Central Principle in the First Amendment," 43 U.Chi.L.Rev. 20 (1975). Accordingly, this Court has consistently condemned speech regulations that invite viewpoint-driven judgments concerning enforcement and administration. *Police Department v. Mosley*, 408 U.S. 92 (1972). Statutes overtly discriminating on the basis of viewpoint are unconstitutional on their face. *Schacht v. United States*, 398 U.S. 58 (1970); *Boos v. Barry*, 485 U.S. 312 (1987); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. \_\_\_, 112 S.Ct. 501 (1991); *R.A.V. v. City of St. Paul*, 505 U.S. \_\_\_, 112 S.Ct. 2538 (1992). Standardless permit systems are similarly unconstitutional on their face because they delegate *de facto* power to censor on the basis of viewpoint. *Lovell v. Griffin*, 303 U.S. 444; *Schneider v. New Jersey*, 308 U.S. 147; *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750. Vague statutes in the First Amendment area are also unconstitutional on their face because they vest enforcement officials with discretion to discriminate on the basis of viewpoint.

*Smith v. Goguen*, 415 U.S. 566 (1974). See Amsterdam, "The Void-for-Vagueness Doctrine in the Supreme Court," 109 U.Pa.L.Rev. 67 (1960). Finally, overbroad statutes purporting to ban both protected and unprotected communicative activity are unconstitutional on their face precisely because they create an excessive risk of viewpoint-based application.<sup>3</sup> *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Houston v. Hill*, 482 U.S. 451. See Fallon, "Making Sense of Overbreadth," 100 Yale L.J. 853 (1991).

Ladue's attempt to ban the display of virtually all signs and symbols in a community likewise creates an excessive risk that viewpoint discrimination will play an impermissible role in its administration and enforcement. Despite Ladue's attempt to defend its massive exercise in censorship as a content-neutral exercise in city planning, the distasteful facts of this case reveal that a flat ban on communicating through signs inevitably lends itself to forbidden viewpoint censorship.

Respondent's original sign was initially the target of vandals,<sup>4</sup> and both signs were targets of municipal authorities,<sup>5</sup> because they conveyed a dissenting message that questioned American policy in the Persian Gulf. At

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<sup>3</sup> Since Ladue's ordinance may not be applied constitutionally against the sign at issue in this case, the ordinance is classically overbroad even if it may be applied constitutionally in other settings. Note, "The First Amendment Overbreadth Doctrine," 83 Harv.L.Rev. 844 (1970). The unconstitutionality of Ladue's ordinance as applied to respondent's sign is discussed *infra* at Point II.

<sup>4</sup> Respondent's first two efforts to post a small sign on her property protesting the war in the Persian Gulf fell victim to vandals who simply tore it down. After ascertaining the sign's content, the Ladue police rebuffed respondent's request for police protection, citing a predecessor ban on signs without a permit.

<sup>5</sup> Three levels of bureaucracy denied respondent a permit for her original sign under Ladue's predecessor ordinance after ascertaining its message.

the very moment Ladue's guardians of public order were denying respondent a permit because her small lawn sign allegedly posed a threat to the town's aesthetic purity, many of Ladue's residences and streets were emblazoned in yellow ribbons and American flags signifying support for our hostages abroad and for our military presence in the Persian Gulf.<sup>6</sup> Unlike their response to respondent's sign, however, Ladue's authorities made no effort to interfere with the widespread display of yellow ribbons to express symbolic support for the Gulf War, even though display of the ribbons, as "banners," "pennants" or "insignia," appears to fall within the definition of "sign" contained in both the predecessor and current ordinance. J.A.120 and J.A.26.<sup>7</sup> Indeed, an earlier, non-controversial sign on respondent's property discussing environmental issues had remained undisturbed, both by neighborhood vandals and by municipal authorities alike. J.A.42-43. Finally, Ladue's Mayor candidly conceded that respondent's sign would have been less objectionable if it had read "Free the Hostages" or "Give Up Dope." J.A.55. Little doubt exists, therefore, that the "controversial" viewpoint espoused by respondent's original sign played a significant role in both private and public efforts to secure its elimination.

Recognizing that its predecessor ordinance was clearly unconstitutional because it was saturated with viewpoint-based judgments during the permit process, Ladue rescinded its permit system mid-way through this litigation and now argues that its current "absolute" anti-

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<sup>6</sup> See affidavit of Nancy Sachs, ¶¶9, 11 and 13. J.A.190-92.

<sup>7</sup> *Amicus* intends no criticism of Ladue's authorities for permitting the widespread display of yellow ribbons as political symbols. The display of symbols to express support for, or opposition to, government policy is fully protected by the First Amendment. *Texas v. Johnson*, 491 U.S. 397 (1989). It is the gross disparity between Ladue's toleration of symbols of support and suppression of signs of dissent that cannot be condoned.



sign ordinance is no longer vulnerable to viewpoint-driven abuse because it allegedly bans all signs regardless of subject matter.<sup>8</sup> But, given the breadth of Ladue's current ordinance, its administration and enforcement will inevitably be viewpoint-sensitive. Given the foibles of human nature, the limits of municipal resources and the pervasive presence of written communication through signs and symbols in our society,<sup>9</sup> a purported ban on all signs and symbols must inevitably degenerate into a viewpoint-driven series of judgments over which signs or symbols are brought to the attention of the authorities and whether scarce enforcement resources should be committed to stamping out, or protecting, a particular sign or symbol. Non-controversial signs and symbols espousing highly popular views, like the yellow ribbons supporting our troops in the Persian Gulf or the display of religious symbols, will continue to be tolerated, both by private vandals and by municipal authorities; while controversial signs, like respondent's, will continue to be brought to the attention of municipal authorities and aggressively suppressed.

In *Houston v. Hill*, 482 U.S. 451, this Court invalidated a similarly quixotic ban on all speech that inter-

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<sup>8</sup> In fact, Ladue's ordinance makes forbidden content distinctions between commercial "For Sale" signs and other identical signs, including non-commercial signs such as the sign at issue in this case. See *infra*, Point III. The invalidity of a total ban on signs is discussed in Point II.

<sup>9</sup> The display of signs and symbols is among the oldest and most pervasive forms of human communication:

And you shall bind them as a sign between your eyes and write them on the doorposts of your house and upon your gates.

DEUTERONOMY, Chapter 6, verses 5-9.

Read literally, Ladue's ordinance bans the display of religious symbols on private property, even during the holiday season.

rupts a police officer in the performance of his or her duties. In words that could have been written for this case, Justice Brennan noted:

The ordinance's plain language is admittedly violated scores of times daily, [yet] only some individuals -- those chosen by the police in their unguided discretion -- are arrested.

482 U.S. at 466-67. See also *id.* at 480-81 (Powell, J., concurring).

As in *Houston v. Hill*, the unavoidable impact of viewpoint on the administration and enforcement of Ladue's effort to ban virtually all signs and symbols from a community is the functional equivalent of granting a standardless licensing power to municipal authorities. By purporting to ban a long-established and pervasive form of communication, Ladue has simply replaced the clearly unconstitutional *de jure* permit system under its predecessor ordinance with an even more dangerous *de facto* permit system under the current ordinance. See *United States v. Reese*, 92 U.S. 214, 222 (1876). Whatever the face of the Ladue ordinance may recite, the reality is a *de facto* standardless licensing system that will tolerate yellow ribbons in support of government policy and suppress innocuous signs opposing it.<sup>10</sup>

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<sup>10</sup> The risk of viewpoint-based administration is enhanced by the fact that Ladue's ordinance is designed to advance an inherently subjective concept -- aesthetics. Certain officials of Ladue appear to believe that a single sign expressing support for a political candidate or cause is an aesthetic detriment, presumably because it is not a tree. Many others, including the Founders, would view evidence of community involvement in self-government as an aesthetic plus because it betokens a vibrant society. There may, of course, come a point where deteriorating or unsightly signs pose a consensus problem in aesthetics. But a belief that political signs are inherently inconsistent with aesthetics is untenable.



## II. LADUE'S ASSERTED INTEREST IN AESTHETICS AND THE MAINTENANCE OF PROPERTY VALUES CANNOT JUSTIFY AN EFFORT TO ELIMINATE THE DISPLAY OF VIRTUALLY ALL SIGNS AND SYMBOLS FROM THE LIFE OF A COMMUNITY

When, as here, the government seeks to stamp out a significant and long-standing medium of communication, it must carry a heavy burden of justification on at least three issues. First, the State must demonstrate an interest in censorship that rivals our nation's historic commitment to free expression. Garden-variety preferences simply cannot justify massive censorship. *Schneider v. New Jersey*, 308 U.S. 147.

Second, the State must demonstrate that the target of its censorship is extraordinarily likely to harm the State's asserted interest. Mere speculation that the communicative activity at issue might lead to something worse can never suffice. *Brandenburg v. Ohio*, 395 U.S. 444.

Third, the State must show that less intrusive means of regulation will not equally advance its interests. Unnecessarily broad efforts at censorship violate the First Amendment. *Sable Communications v. FCC*, 492 U.S. 115.

Ladue's effort to eliminate signs as a significant medium of communication fails all three tests. In fact, the two versions of Ladue's anti-sign ordinance are classic examples of how not to regulate speech. The original ordinance sought to delegate *ad hoc* authority to draw lines to local enforcement officials, resulting in a standardless permit system. The current ordinance refuses to draw any lines at all, resulting in an unconstitutionally overbroad ordinance and a *de facto* permit system.

Despite Ladue's apparent aversion to the process, however, the careful drawing of lines is the key to any

serious effort to regulate speech. While the aesthetic problem of visual clutter may well justify thoughtful regulation of the format, number, size and location of certain signs, it cannot justify an overbroad effort to extirpate a significant and long-established medium of communication from the life of a community.

### A. Ladue's Asserted Interest In Aesthetics Is Insufficient To Justify Massive Censorship Aimed At Eliminating The Display Of Signs And Symbols As A Significant Medium Of Communication

In order to justify an interference with free speech of a magnitude similar to Ladue's effort to ban virtually all private signs and symbols, government must seek to advance an interest that has been variously described as "compelling," "subordinating," "paramount," "cogent," "strong," "important," or "substantial." See *United States v. O'Brien*, 391 U.S. 367, 376-77, nn.22-27 (1968); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 564 (1980). *Amicus* believes that the precise term used to describe the required quality of the State's interest is less important than a recognition that the interest must transcend the general run of concerns ordinarily motivating government. In adopting the First Amendment, the Founders balanced the ordinary concerns of government against the value of free expression and resoundingly endorsed free expression. Banning the display of virtually all signs and symbols on private property in the name of aesthetics fails to respect that foundational balance. *Cohen v. California*, 403 U.S. 15 (1971); *Street v. New York*, 394 U.S. 576 (1969); *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975). Thus, even if Ladue's anti-sign ordinance could escape inevitable entanglement in viewpoint-driven judgments about whether and when to enforce it, the ordinance would, nevertheless, violate the First Amendment on its face because Ladue's asserted interest in aesthetics cannot justify a

flat ban on the type of sign at issue in this case.<sup>11</sup> Although aesthetics might well justify limits on the number, format, placement and size of certain signs in certain settings, an interest in community beautification simply cannot justify an effort to stamp out all signs, even the 8.5 x 11 inch sign in respondent's second floor front window announcing her opposition to the war in the Persian Gulf.<sup>12</sup>

Once before in the nation's history, municipal authorities sought to justify a complete ban on a significant and long-standing medium of communication -- leafletting -- by asserting an interest in the aesthetics of clean streets. In *Schneider v. New Jersey*, 308 U.S. 147, this Court soundly rejected the notion that aesthetics could justify the total elimination of a significant medium of communication from the life of a community, invali-

<sup>11</sup> Since Ladue's ordinance may not be applied constitutionally to respondent's sign, it is unconstitutional both as applied and on its face as classically overbroad, since it sweeps both protected and unprotected communication within its ambit. *Houston v. Hill*, 482 U.S. 451. Given the overbreadth in the very definition of "sign," J.A.120, it is impossible, despite the presence of a severability clause, to parse Ladue's ordinance to separate the valid from the invalid provisions. The existence of a severability clause is not a warrant to the courts to re-write the statute's core definitional sections.

<sup>12</sup> In addition to the Eighth Circuit below, the lower federal courts have unanimously invalidated similar efforts to ban the display of all signs on private property. *Arlington County Rep. Comm. v. Arlington, Va.*, 983 F.2d 587 (4th Cir. 1993); *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985); *National Advertising Co. v. Town of Niagara*, 942 F.2d 145 (2d Cir. 1991); *National Advertising Co. v. City of Orange*, 861 F.2d 246 (9th Cir. 1988); *Whitton v. City of Gladstone*, 832 F.Supp. 1329 (W.D.Mo. 1993); *City of Antioch v. Candidates' Outdoor Graphics Svc.*, 557 F.Supp. 52 (N.D.Cal. 1982); *Loftus v. Township of Lawrence Park*, 764 F.Supp. 354 (W.D.Pa. 1991). See also *Baldwin v. City of Redwood*, 540 F.2d 1360 (9th Cir.), cert. den. sub nom. *Leipig v. Baldwin*, 431 U.S. 913 (1977); *Aiona v. Pai*, 516 F.2d 892 (9th Cir. 1975); *Orazio v. Town of Hempstead*, 426 F.Supp. 1144 (E.D.N.Y. 1977).

dating three municipal ordinances that imposed flat bans on leafletting in the name of clean streets. Indeed, in *Niemotko v. Maryland*, 340 U.S. 268, 276 (1951) (Frankfurter, J., concurring), Justice Frankfurter observed that the "easiest" free speech cases were those where a municipality sought to justify a ban on leafletting by asserting an aesthetic interest in clean streets. In words directly relevant to this case, Justice Frankfurter stated:

The easiest cases have been those in which the only interest opposing free communication was that of keeping the streets of the community clean. This could scarcely justify prohibiting the dissemination of information by handbills or censoring their contents.

340 U.S. 268, 276 (1951).

The Ladue anti-sign ordinance is a modern variant of the anti-leafletting ordinances struck down in *Schneider*. Instead of leaflets, the target medium is signs. Instead of the aesthetics of clean streets, the municipal interest is the aesthetic avoidance of "visual clutter." But the balance between free speech and aesthetics is the same. *Schneider* and its progeny teach that aesthetics is simply not a sufficient basis for wiping out an entire medium of communication. Thus, while cases like *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); and *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), suggest that aesthetics may justify the regulation of various forms of communication, nothing in this Court's free speech jurisprudence supports the proposition that aesthetics can justify the virtual elimination of a significant and long-standing medium of communication from the life of a community.

*City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, provides no support for the total elimination of signs as a significant medium of communication. The

Los Angeles ordinance upheld in *Taxpayers for Vincent* banned signs from *public* property on aesthetic grounds, but explicitly declined to impose a ban on signs on *private* property. Justice Stevens, writing for the Court, recognized that a private property owner's self-interest would naturally guard against aesthetic degradation, making municipal regulation of signs on private property less necessary. Moreover, he noted that the widespread availability of signs on private property mitigated the impact of the Los Angeles regulation on the free flow of information. *Id.* at 811.

Nor does *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, support a flat ban on all signs in the name of community beautification. The plurality opinion in *Metromedia* carefully confined that case to the regulation of large permanent billboards that are the equivalent of structures.<sup>13</sup> Nothing in *Metromedia* suggests that all signs may be totally banned merely because some large billboards may be regulated.<sup>14</sup>

Finally, *Renton* was explicitly premised on a finding that the municipal zoning regulation at issue in that case left over 520 acres available for the speech in question. 475 U.S. at 53-54. The non-intrusive zoning rules at is-

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<sup>13</sup> The California Supreme Court definitively construed the San Diego ordinance narrowly to prevent its application to "a small sign placed in one's front yard proclaiming a political or religious message." 453 U.S. at 494, n.2.

In fact, the categorical content distinctions drawn by the Ladue ordinance between commercial and non-commercial speech are virtually identical to the content-based distinctions that doomed the San Diego ordinance in *Metromedia*. See *infra* at pp.24-25 & n.19.

<sup>14</sup> In the years since *Metromedia*, this Court has repeatedly acknowledged the interest of hearers in receiving information. Given the importance of signs as a means of disseminating such information, *amicus* does not believe that aesthetics can justify a total ban even on large permanent signs, as opposed to their thoughtful regulation.

sue in *Renton* are a far cry from Ladue's effort to impose a flat ban on an entire medium of communication. See *Young v. American Mini Theaters*, 427 U.S. 50, 71, n.35 (1976).

Indeed, in the years since *Schneider v. New Jersey*, this Court has repeatedly refused to permit aesthetic disapproval to justify censorship. For example, in *Cohen v. California*, 403 U.S. 15, Justice Harlan, writing for the Court, held that vulgar language could not be banned merely because it offended hearers:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours . . . . To many, the immediate consequences of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance . . . . [But] that the air may at times be filled with verbal cacophony is . . . not a sign of weakness but of strength.

403 U.S. at 24-25. See also *Erzoznik v. City of Jacksonville*, 422 U.S. at 210-11.

Thus, Ladue's asserted interest in aesthetics simply cannot justify censorship of the sweep imposed by a flat ban on virtually all signs wherever located.

#### **B. Ladue's Assertion That Permitting Signs Similar To Respondent's Poses A Significant Risk Of Aesthetic Degradation Through "Visual Clutter" Is Wholly Unsubstantiated**

Even if aesthetics were a sufficiently weighty interest to justify Ladue's effort at mass censorship, Ladue must demonstrate that respondent's sign actually poses a genuine threat of "visual clutter" before suppressing it. Mere speculative fear or "undifferentiated apprehension" cannot suffice. *Brandenburg v. Ohio*, 395 U.S. 444;



*Tinker v. Des Moines Indep. Community School Board*, 393 U.S. 503, 508 (1969).

One of Justice Holmes' great gifts to the nation was his recognition that speech may not be suppressed merely because it *may* pose a threat to a government interest. Prior to Justice Holmes, government was permitted to justify censorship by showing that a particular form of communication had a "bad tendency" to impair a significant government interest. *Gitlow v. New York*, 268 U.S. 652 (1925). Justice Holmes' seminal free speech opinions reject the "bad tendency" test and establish that government must prove that the target speech actually poses an imminent threat to the asserted government interest. *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes and Brandeis, JJ., dissenting); *Gitlow v. New York*, 268 U.S. at 672 (Holmes and Brandeis, JJ. dissenting). *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis and Holmes, JJ., concurring). See Strong, "Fifty Years of 'Clear and Present Danger': From *Schenck* to *Brandenburg*," 1969 Sup.Ct.Rev. 41. Speculative fear that the speech in question may lead to something worse can never justify censorship of the sweep attempted by the Ladue ordinance. *Edenfield v. Fane*, 507 U.S. \_\_\_, 113 S.Ct. 1792 (1993).

Since it would border on the absurd to claim that a small hand-lettered sign in a second floor window is itself an aesthetic threat, petitioners seek to defend a total ban on signs by speculating that unsightly signs will proliferate uncontrollably unless even the most innocuous signs are completely banned. In support of that dubious assumption, petitioners presented the affidavit of a single witness -- Malcolm Drummond, a city planner. J.A.138-59. Mr. Drummond described Ladue's requirement of three-acre residential zoning, recounted Ladue's refusal to permit apartment houses, and noted that less than 5%

of the total land mass of Ladue is occupied by structures. The remaining 95% is parkland, or private grounds surrounding residences with larger than normal set-backs. While Mr. Drummond opined that the "careful regulation" of "signage" is an "essential element of city planning," he carefully refrained from urging a complete prohibition on signs. Read most generously for petitioners, Mr. Drummond's affidavit warns that signs with no "natural limit on number or duration" create a "risk" of proliferation causing visual blight. J.A.154. Basing widespread censorship on such a speculative assessment of "risk" is precisely the evil that Justice Holmes sought to avoid in *Gitlow* and precisely the type of "undifferentiated apprehension" condemned in *Tinker* and *Brandenburg*.

Moreover, Ladue's assumption that, unless all signs are banned, unsightly signs will sprout like mushrooms throughout the city faces two insurmountable objections. First, in *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505, Cincinnati abandoned as untenable a virtually identical speculative fear of proliferation as a justification for censorship. *Id.* at 1515. In *Discovery Network*, Cincinnati had sought to defend its ban on commercial newsracks by arguing that commercial newsracks were especially prone to proliferate. After the Sixth Circuit commented scathingly on its proliferation argument, 946 F.2d at 466-67, Cincinnati did not even attempt it in this Court. Cincinnati recognized that fear of uncontrollable proliferation was speculative and, in any event, could not justify a total ban on all commercial newsracks. In fact, Ladue's "proliferation" argument is much weaker than Cincinnati's.<sup>15</sup> With more than 2,000 newsracks on its streets, Cincinnati was arguably at a saturation point that

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<sup>15</sup> The Eighth Circuit commented on the weakness of petitioners' argument that non-commercial signs are subject to uncontrolled proliferation. 986 F.2d at 1183, n.7.

would have made fear of proliferation a credible concern. As the Drummond affidavit demonstrates, however, the display of an occasional sign on a lawn or in a window is hardly an imminent aesthetic threat in a city 95% of which consists of well-manicured parkland and spacious private grounds.

Second, as Justice Stevens noted in *Taxpayers for Vincent*, owners of private property, especially residential property, have a powerful motive to care about the aesthetics of their property. Accordingly, he reasoned, it was unnecessary to forbid signs on private property to guard against runaway visual blight. In the three years that Ladue has operated under court order without a ban on signs,<sup>16</sup> Ladue's citizens have behaved exactly as Justice Stevens predicted. Occasional signs are displayed, expressing a deeply felt idea; but there is no evidence whatever that uncontrolled proliferation has given rise to visual blight anywhere but in the overheated imaginations of Ladue's officialdom.

**C. Ladue's Asserted Interest In Stemming Visual Blight Does Not Require A Total Ban On Signs. Reasonable Regulation Of The Number, Format, Size And Duration Of Signs Is An Obvious Less Drastic Means Of Advancing Ladue's Asserted Aesthetic Interest**

Where, as here, obvious alternatives exist that would fully protect the government's asserted interest without resorting to unnecessary censorship, the First Amendment requires use of the less drastic alternative. *Martin v. Struthers*, 319 U.S. 141 (1943); *Sable Communications v. FCC*, 492 U.S. 115; *Peel v. Attorney Registration and*

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<sup>16</sup> Ladue's anti-sign ordinance has been judicially suspended since January 7, 1991.

*Disc. Comm'n*, 496 U.S. 91 (1990). While disputes have arisen over whether an alleged alternative is an equally effective means of advancing the government's interest,<sup>17</sup> no doubt exists in this case that thoughtful regulation, as opposed to total prohibition, is an adequate defense against the bogeyman of uncontrolled proliferation of unsightly signs. See *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987); *Lee v. International Society for Krishna Consciousness, Inc.*, 505 U.S. \_\_\_, 112 S.Ct. 2709, 2711 (O'Connor, J.), 2715 (Kennedy, J.), 2724 (Souter, J.) (1992).

**D. Ladue's Effort To Impose A Total Ban On Virtually All Private Signs Cannot Be Defended As A "Time, Place Or Manner" Regulation**

Recognizing that its ordinance cannot survive traditional First Amendment scrutiny, Ladue attempts to invoke the less stringent review applied to time, place or manner restrictions. *United States v. O'Brien*, 391 U.S. 367; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Ward v. Rock Against Racism*, 491 U.S. 781. The short answer to petitioners' effort to seek shelter in the time, place and manner doctrine is that even time, place and manner rules must be "narrowly tailored" to avoid unnecessary interference with free speech. As Justice Kennedy observed for the Court in *Rock Against Racism*:

Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place or manner of protected speech must

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<sup>17</sup> Compare *Board of Trustees v. Fox*, 492 U.S. 469 (1989) (no need for "perfect" fit between means and ends; "reasonable fit sufficient") with *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (government must show that its interest cannot be protected adequately by more limited regulation of appellant's speech).

be narrowly tailored to serve the government's legitimate content-neutral interests, but that it need not be the least-restrictive or least-intrusive means of doing so . . . . To be sure, this standard does not mean that a time, place or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

*Id.* at 798-99.

Indeed, in words that are particularly applicable to this case, Justice Kennedy concluded:

A ban on handbilling, of course, would suppress a great quantity of speech that does not cause the evils that it seeks to eliminate, whether they be fraud, crime, litter, traffic congestion or noise. For that reason, a complete ban on handbilling would be substantially broader than necessary to achieve the interests justifying it.

491 U.S. at 799, n.7.

Substitute the word "signs" for the word "handbilling" and Justice Kennedy was deciding this case.

Even more importantly, however, Ladue's flat ban on the display of signs and symbols on private property is not a mere time, place or manner restriction. Censorship of such sweep, aimed at virtually eliminating a long-established and pervasive medium of communication, must satisfy rigorous First Amendment standards. Nothing in the Court's free speech jurisprudence suggests that a regulation aimed at eliminating one of our most significant and pervasive forms of communication should be

tested under relaxed standards. If, for example, Ladue sought to ban books in order to save paper, its attempt at censorship would not be viewed as a mere time, place or manner rule. The dramatic impact on free speech of such an attempt to ban a long-established medium of communication would require it to pass rigorous First Amendment scrutiny. Instead of books, Ladue has banned signs. While the justifications for banning books and signs may vary, the rigorous First Amendment standard of review does not.

In order to qualify as a time, place or manner rule, a speech regulation must permit the speech in question *some* time, *some* place, or *some* manner. From the inception of the doctrine in *Cox v. New Hampshire*, 312 U.S. 569 (1941), through its refinement in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), to its current application in *Ward v. Rock Against Racism*, 491 U.S. 781, the doctrine has been used to regulate the geography of speech and to assure that unconventional means of communication did not cause undue dislocation to other important governmental interests. But the fundamental assumption underlying the slightly relaxed rules governing time, place or manner regulations is that such regulations do not pose a significant impediment to the free flow of ideas. The time, place or manner doctrine has no place, therefore, in the analysis of an attempt to eliminate an entire medium of communication.<sup>18</sup>

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<sup>18</sup> Petitioners' efforts to show that alternative forms of speech were available to respondent are, thus, irrelevant. If Ladue outlawed books instead of signs, the fact that alternative means of communication were alleged to exist could not be a defense to such a drastic interference with free expression.

Moreover, it is obvious that the alleged alternative means of communication trumpeted by petitioners are fundamentally different in nature and quality. Requiring respondent to phone all of her neighbors, or to put material in their mailboxes, is hardly an adequate al-

(continued...)



### III. LADUE'S ORDINANCE MAKES IMPERMISSIBLE CONTENT-BASED DISTINCTIONS BETWEEN COMMERCIAL AND NON-COMMERCIAL SPEECH

Even if aesthetics were a sufficient basis for eliminating all signs, Ladue's ordinance does not purport to eliminate all signs. It explicitly permits commercial "For Sale" or "For Rent" signs (but not non-commercial signs like respondent's) in residential neighborhoods and permits commercial signs, but not non-commercial signs, in commercial areas. Thus, Ladue makes precisely the content-based distinction between commercial and non-commercial speech that doomed the ordinance in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, and makes the obverse of the distinction that doomed the ordinance in *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505.

In *Metromedia*, a plurality<sup>18</sup> of the Court voted to in-

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<sup>18</sup> (...continued)

ternative to the display of a sign or symbol. The display of signs and symbols evolved as significant medium of communication precisely because it differs from verbal or individually directed written speech.

The existence of alternative means of expression, as used in time, place or manner analysis, means alternatives of the same nature and quality as the forbidden expression. Thus, in *Taxpayers for Vincent*, the alternatives included identical signs on private property. In *Clark v. Community for Creative Non-Violence*, the alternatives included identical demonstrations in the park. In *Rock Against Racism*, the alternatives included the very music at issue. In *Renton*, the alternatives included the identical speech at a different geographical location. Conversely, the alleged existence of alternative forms of communication have been deemed irrelevant when they are of a different quality and nature than the communication at issue. E.g., *Texas v. Johnson*, 491 U.S. 397 (alternatives to flag-burning); *Cohen v. California*, 403 U.S. 15 (alternative to vulgar language).

<sup>19</sup> Justice White delivered the plurality opinion in *Metromedia*, joined by Justices Stewart, Marshall and Powell, condemning the discrimina-

(continued...)

validate a San Diego ordinance regulating billboards because the ordinance discriminated against non-commercial speech. The aversion to content-based discrimination that motivated the *Metromedia* plurality ripened into a cogent theory in *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505. In *Discovery Network*, Cincinnati attempted to ban commercial newsracks while permitting newspapers unlimited access to the medium. Cincinnati argued that commercial speech was less important than newspapers and, thus, could be differentially treated in the interest of aesthetics and public safety. Justice Stevens, writing for the Court, rejected Cincinnati's attempt to discriminate against commercial speech, reasoning that the City's asserted interest in aesthetics and public safety did not justify differential treatment of commercial and non-commercial speech.

This case is the obverse of *Discovery Network*. Instead of discriminating against commercial speech, as in *Discovery Network*, Ladue discriminates in favor of it. As in both *Discovery Network* and *Metromedia*, however, Ladue's asserted interest in regulation -- aesthetics -- does not support differential treatment of commercial and non-commercial speech. No intrinsic aesthetic difference exists between identical signs expressing commercial or non-commercial messages. Ladue concedes that obvious truth; but argues that non-commercial signs are more likely to "proliferate" uncontrollably. However, both commercial and non-commercial signs are equally amenable to regulation as to number, size, duration and location. Thus, as in *Discovery Network*, no reasonable

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<sup>19</sup> (...continued)

tion against non-commercial speech. 453 U.S. at 512-17. Justices Brennan and Blackmun voted to invalidate the ordinance because it constituted a *de facto* total ban that had not been adequately justified. *Id.* at 521. Chief Justice Burger, (*id.* at 554), Justice Rehnquist, (*id.* at 568), and Justice Stevens, (*id.* at 539), voted to uphold the ordinance.

linkage exists between the government interest in censorship and the decision to treat commercial and non-commercial speech differently.

In the absence of a persuasive, non-speculative functional justification for differential treatment, the decision to treat commercial speech better or worse than its non-commercial cousin turns on a forbidden subjective judgment about the relative "importance" or "value" of categories of protected expression. As Justice Powell repeatedly warned, however, the First Amendment places judgments about the relative value of different categories of speech in the private marketplace of ideas, not in the hands of a government regulator. *Young v. American Mini Theaters*, 427 U.S. at 82, n.6 (Powell, J. concurring); *FCC v. Pacifica Foundation*, 438 U.S. 726, 761 (1978) (Powell, J. concurring). Although the short term interests of commercial speakers might be enhanced by seeking privileged treatment at the expense of non-commercial speakers, the long-term interests of the First Amendment demand content-neutrality in the absence of a powerful functional justification for treating one category of speech more favorably than another. Since no reason exists to treat commercial and non-commercial speech differently on aesthetic grounds, Ladue's ordinance is in clear violation of *Discovery Network*.

#### IV. LADUE'S EFFORT TO BAN THE DISPLAY OF SIGNS AND SYMBOLS ON PRIVATE PROPERTY VIOLATES THE RIGHT OF A PROPERTY OWNER TO USE PRIVATE PROPERTY FOR COMMUNICATIVE PURPOSES

Whatever power the State may possess to regulate the communicative use of its own property,<sup>20</sup> or to im-

<sup>20</sup> See *United States v. O'Brien*, 391 U.S. 367 (draft cards); *Greer v.* (continued...)

pose restrictions on public property held for common use,<sup>21</sup> government power is at its lowest ebb when it seeks to forbid the use of private property for expressive use. Whether the context has been regulation of the electoral process, *Buckley v. Valeo*, 424 U.S. 1; regulation of public utilities, *Pacific Gas & Elec. v. Public Utilities Comm'n*, 475 U.S. 1 (1986); enforcement of the criminal law, *Stanley v. Georgia*, 394 U.S. 557 (1969); motor vehicle regulation, *Wooley v. Maynard*, 430 U.S. 705 (1977); postal regulation, *Lamont v. Postmaster General*, 381 U.S. 301 (1965); zoning, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); newspapers, *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); regulation of public television, *FCC v. League of Women Voters*, 468 U.S. 364; flag usage, *Spence v. Washington*, 418 U.S. 405 (1974), and *Texas v. Johnson*, 491 U.S. 397; regulation of corporations, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); or commercial speech, *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, this Court has consistently upheld the right of a property owner to utilize private property for expressive ends.<sup>22</sup> And when, as

<sup>20</sup> (...continued)

*Spock*, 424 U.S. 828 (1976)(military base); *United States Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981)(mail boxes); *Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984)(telephone poles); *Rust v. Sullivan*, 500 U.S. \_\_\_, 111 S.Ct. 1759 (1991)(use of public funds); *United States v. Kokinda*, 497 U.S. 720 (1990)(postal property).

<sup>21</sup> Compare *Clark v. Community for Creative Non-Violence*, 468 U.S. 288; *Ward v. Rock Against Racism*, 491 U.S. 781; and *Burson v. Freeman*, 504 U.S. \_\_\_, 112 S.Ct. 1846 (1992); with *Lee v. Society of Krishna Consciousness Inc.*, 112 S.Ct. 2709; *Frisby v. Schultz*, 487 U.S. 474 (1988); *United States v. Grace*, 461 U.S. 171 (1983); and *Hague v. CIO*, 307 U.S. 496 (1939).

<sup>22</sup> The Court has recognized the correlative right of a property owner to refrain from using his property for communicative purposes. *Wooley v. Maynard*, 430 U.S. 705.

here, the private property is residential, the right is at its strongest. *Stanley v. Georgia*, 394 U.S. 557; *Moore v. City of East Cleveland*, 431 U.S. 494. But see *City of Ladue v. Joan K. Horn and Terrence Jones*, 720 S.W.2d 745 (Mo. Ct.App. 1986)(enforcement of Ladue's anti-cohabitation ordinance against member of Congress who lived with unmarried partner and children).

The power of the private property-free expression combination should come as no surprise, since free expression and private property are the principal guarantees of individual autonomy contained in the Constitution. When the two concepts pull in different directions, the Court is confronted with the extremely difficult task of choosing between the two. E.g., *Marsh v. Alabama*, 326 U.S. 501 (1946); *Lloyd Corporation v. Tanner*, 497 U.S. 551 (1972); *Pruneyard Shopping Center v. Robins*, 447 U.S. (1980). But where, as here, the two concepts overlap and reinforce each other, the combined force of both can be breached by the government, if at all, only upon a showing of extraordinary social need that far transcends Ladue's "undifferentiated apprehension" that the display of any signs at all inevitably leads to aesthetic degradation.

## CONCLUSION

For the above-stated reasons, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

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Dated: December 13, 1993